87-1823

No.



IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1987

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,

*Petitioners,*

v.

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION AND PROSERV, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Question Presented

Whether the Second Circuit erred in holding, contrary to the rule in other Circuits, that *every* interlocutory order which dismisses on the merits a claim which includes a request for permanent injunctive relief is automatically subject to immediate appeal under 28 U.S.C. § 1292(a)(1) (1982)?

## Rule 28.1 Statement

Petitioner Men's International Professional Tennis Council is an unincorporated association comprised of representatives of three organizations, none of which is publicly owned. Petitioners M. Marshall Happer III and Philippe Chatrier are individuals.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Men's International Professional Tennis Council ("MIPTC"), M. Marshall Happer III and Philippe Chatrier, defendants below,[1] respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered on February 8, 1988, which denied petitioners' motion to dismiss the appeals on jurisdictional grounds. The appeals, noticed by respondents Volvo North America Corporation ("Volvo"), International Merchandising Corporation ("IMC") and ProServ, Inc. ("ProServ"), plaintiffs and counterclaim defendants below, sought partial review of an interlocutory order dismissing certain claims in the First Amended Complaint (the "Complaint").

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[1] Petitioners MIPTC and Happer are also counterclaimants below against each of the respondents and against additional counterclaim defendants.

The Second Circuit refused to dismiss the appeals although: (1) the district court's August 10, 1987 Memorandum and Order (the "Order") of dismissal was interlocutory because counterclaims were pending; (2) one of the appellants, Volvo, was not seeking to appeal the entire Order of the district court which had dismissed certain of its claims without prejudice, but only so much of that Order as dismissed certain of Volvo's other claims with prejudice; (3) the dismissed Complaint did not request preliminary injnctive relief; and (4) in the two years between the filing of the Complaint and its dismissal, none of the respondents had ever moved for any interim relief.

Instead, the Second Circuit interpreted this Court's decision in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), to hold that the mere fact that a dismissed complaint requested *permanent* injunctive relief, *by itself*, presents a "serious, perhaps irreparable, consequence" that can only be "effectually challenged" by immediate appeal. That interpretation of *Carson* placed the Second Circuit in direct conflict with other circuit courts of appeals which have, petitioners respectfully submit, properly interpreted this Court's holding in *Carson*.

## Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 839 F.2d 69 and is reproduced at the appendix hereto.

## Jurisdiction

The decision of the Second Circuit was entered on February 8, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

## Statutory Provision Involved

Section 1292(a)(1) of Title 28 of the United States Code provides in pertinent part:

> "(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

## Statement of the Case

Petitioner MIPTC is a not-for-profit association which organizes, schedules and administers a circuit of men's professional tennis events known as the "Grand Prix." On April 17, 1985, respondent Volvo, a distributor of automobiles which owns, produces and sponsors certain men's professional tennis events, brought an action against MIPTC, M. Marshall Happer III, its Administrator, and Philippe Chatrier, its then-Chairman. Volvo's initial complaint contained claims arising under sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, *et seq.* (1982), and under state law. The initial complaint explicitly requested preliminary as well as permanent injunctive relief, although Volvo never moved for any interim relief based upon the claims of its initial complaint.

Petitioners moved to dismiss Volvo's complaint, but that motion was never decided because Volvo served the First

Amended Complaint dated July 3, 1985 (the "Complaint"). The amended pleading *dropped* the initial complaint's request for preliminary injunctive relief. Joining Volvo as plaintiffs below were IMC and ProServ, two sports management firms or "player-agents," organizations which, *inter alia,* represent and manage men's professional tennis players and are present in virtually every aspect of men's professional tennis. In the Complaint all three respondents alleged violations of sections 1 and 2 of the Sherman Act as well as interference with prospective business relationships and unfair competition. Volvo additionally alleged defamation, product disparagement, breach of contract and fraud.

The Complaint's prayer for relief sought compensatory, punitive and treble damages, declaratory and injunctive relief, interest, costs and attorneys' fees. The Complaint did *not* pray for relief *pendente lite.*

Petitioners filed a motion to dismiss the Complaint on September 13, 1985. Petitioners MIPTC and Happer also filed counterclaims against respondents and additional counterclaim defendants on November 6, 1985.[2] Those counterclaims are still pending.

Discovery began by way of interrogatories and document production. Hundreds of thousands of pages of documents were exchanged.

In 1985, none of the respondents moved for a preliminary injunction or temporary restraining order against any of the petitioners. In 1986, none of the respondents moved for a preliminary injunction or temporary restraining order against any of the petitioners. In 1987, none of the respond-

[2] Respondents moved to dismiss the counterclaims and that motion has not been decided by the district court.

ents moved for a preliminary injunction or temporary restraining order against any of the petitioners.

On August 10, 1987, the district court, per Hon. Kevin Thomas Duffy, entered an Order granting petitioners' motion to dismiss the Complaint. The district court's Order did not address respondents' entitlement to injunctive relief or engage in any balancing of hardships and equities. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court dismissed the claims which were raised by all three respondents for failure to state a claim upon which relief can be granted. Those claims—federal antitrust law violations, tortious interference with prospective business relationships and unfair competition—were all dismissed with prejudice. Volvo's individual state law claims, however, were dismissed with leave to replead.[3]

Notices of appeal were filed by Volvo and ProServ on September 8, 1987 and by IMC on September 9, 1987. Volvo claimed that it had not abandoned its right to seek to replead certain of its state law claims but intended to replead them following disposition of the appeal concerning its other claims by the appellate court.

None of the respondents claimed that the district court's Order was final. None had obtained certification of that Order pursuant to 28 U.S.C. § 1292(b) (1982), and judgment was not entered by the district court pursuant to Rule

[3] The district court dismissed without prejudice Volvo's defamation and product disparagement claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Volvo's fraud claim was dismissed without prejudice for lack of particularity as required by Fed. R. Civ. P. 9(b). Volvo's breach of contract claim was dismissed without prejudice for lack of jurisdiction: Volvo had not pled diversity jurisdiction but only pendent jurisdiction as a basis for its state law claims, and all federal law claims had been dismissed with prejudice.

54(b) of the Federal Rules of Civil Procedure.[4] Rather, respondents asserted that the non-final Order was appealable as of right pursuant to 28 U.S.C. § 1292(a)(1) (1982), as the refusal of an injunction.

On October 20, 1987, petitioners made a motion in the United States Court of Appeals for the Second Circuit for dismissal of the appeals. Petitioners argued that the Order was nonappealable under this Court's decision in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), because (1) it did not constitute the refusal of an injunction; (2) given respondents' failure to seek a preliminary injunction in over two years, the unavailability of immediate appeal would not cause them any harm, much less *serious* harm; and (3) the interlocutory Order could be effectively challenged following entry of judgment on the remaining claims in the action.

Respondents, in opposition to the motion to dismiss their appeals, introduced through the affidavits of attorneys and others new factual allegations which were not part of the record before the district court. These affidavits chiefly concerned anticompetitive conduct not addressed in the Complaint but allegedly engaged in by petitioners after the Complaint was filed and before the district court entered its Order. Neither the conduct alleged in the Complaint nor the conduct referred to in respondents' affidavits, however, was ever the subject of any request to the district court for relief *pendente lite*. Moreover, respondents never sought leave from the district court to amend their Complaint to include any of the allegedly anticompetitive conduct occurring after the Complaint was filed.

[4] Respondents made an oral request of the district court for Rule 54(b) certification *after* they filed notices of appeal. That request was denied. *See* n.10, *infra*.

On February 8, 1988, the Second Circuit entered an order denying the motion to dismiss the appeals.[5] The Second Circuit, per Hon. Daniel J. Mahoney, agreed with petitioners that the district court's Order did not actually constitute the refusal of an injunction but merely had the practical effect of refusing an injunction, thus rendering controlling this Court's decision in *Carson, supra.* The Second Circuit, however, then interpreted *Carson* in a manner which placed it in direct conflict with other circuit courts of appeals.

On March 8, 1988, petitioners made a motion in the Second Circuit to have the appeals held in abeyance pending petition for a writ of certiorari to this Court. On March 16, 1988, that motion was denied. Thus, the appeals were fully briefed and are set for argument on May 9, 1988.

## Reasons for Granting the Writ

Petitioners respectfully submit that the Court should grant this writ to resolve a conflict which exists among the circuits on a significant question of appellate jurisdiction. In *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), this Court set forth a standard for determining when appellate jurisdiction exists to review orders which do not actually refuse injunctions but have the "practical effect" of refusing injunctions. Since then, as the Second Circuit noted in its opinion, "*Carson* has spawned an array of circuit court opin-

[5] The Second Circuit indicated that it was denying petitioners' motion to dismiss with respect to the antitrust claims of all three respondents and with respect to Volvo's state law claims of interference with prospective business relationships and unfair competition. The Second Circuit also indicated that it was granting petitioners' motion to dismiss with respect to Volvo's other state law claims. Volvo, however, had not sought to appeal those remaining state law claims.

ions which have attempted to cope with its implications." *Volvo North America Corp.* v. *Men's International Professional Tennis Council,* 839 F.2d 69, 73 (2d Cir. 1988). *See also Sims Varner & Assoc., Inc.* v. *Blanchard,* 794 F.2d 1123, 1126-27 & n.6 (6th Cir. 1986) (noting a conflict among circuits but declining to resolve the issue). The Second Circuit's application of *Carson* in this case, although consistent with the rule of the District of Columbia Circuit,[6] is in conflict with the decisions of three other circuit courts and has added to the confusion which exists on this important issue.[7]

In this case, the Second Circuit ruled that under the *Carson* test the mere dismissal on the merits of a claim which seeks ultimate injunctive relief, without any special showing of probable injury, suffices to invoke appellate review of a non-final order under section 1292(a)(1). The Second Circuit thus rejected the considered holdings of the First, Third and Federal Circuits. Those courts have interpreted *Carson* to mean that where a complaint is dismissed on other grounds, the mere fact that the complaint included a request for permanent injunctive relief does not, without more, establish the presence of serious, irreparable harm

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[6] *See Center for National Security Studies* v. *CIA*, 711 F.2d 409, 412 (D.C. Cir. 1983) (interlocutory appeal allowed from order having the practical effect of denying an injunction, regardless of whether serious, irreparable harm was shown, where order involved a ruling on the merits).

[7] Moreover, internal conflicts exist within two other circuits respecting the proper interpretation of *Carson. See Brown* v. *Kerr-McGee Chemical Corp.,* 767 F.2d 1234, 1238-40 (7th Cir. 1985), *cert. denied,* 475 U.S. 1066 (1986) (acknowledging inconsistent decisions within the Seventh Circuit); *compare Shanks* v. *City of Dallas,* 752 F.2d 1092, 1096 (5th Cir. 1985) *and Gould* v. *Control Laser Corp.,* 650 F.2d 617, 621 (5th Cir. 1981) *with Commodity Futures Trading Commission* v. *Preferred Capital Investment Co.,* 664 F.2d 1316, 1319-21 (5th Cir. 1982).

justifying immediate appeal. *See Woodard* v. *Sage Products, Inc.*, 818 F.2d 841, 852 (Fed. Cir. 1987) (en banc); *Shirey* v. *Bensalem Township*, 663 F.2d 472, 477 (3d Cir. 1981); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 17-18 (1st Cir. 1981).

Furthermore, until this Court resolves the conflict among the circuits over the proper application of *Carson*, it will be possible in some courts, such as the Second and District of Columbia Circuits, to circumvent the clear Congressional policy favoring finality prior to review. The Second Circuit rule permits every litigant, merely by inserting into its pleading a request for permanent injunctive relief, to ensure that, if dismissed, its claims will obtain immediate interlocutory review. As a result, piecemeal review will become the norm instead of an unusual measure taken only in extraordinary circumstances, and the caseload of the appellate courts may increase dramatically.

**This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits As to Whether Interlocutory Appellate Jurisdiction Is Available to Review Every Non-Final Order Dismissing a Claim Which Requests Permanent Injunctive Relief, Regardless of Whether Special Harm Is Shown**

Section 1292(a)(1) carves out an exception to the final judgment rule by permitting review of interlocutory orders by a district court "granting, continuing, modifying, refusing or dissolving injunctions." This Court has interpreted section 1292(a)(1) to apply in addition to "orders that have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequence.' " *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, — U.S. —,

108 S. Ct. 1133, 1143 (1988) (quoting *Carson* v. *American Brands, Inc.*, 450 U.S. at 84).

In *Carson,* the Court set forth the following test for evaluating the appealability of *de facto* injunctive orders:

> For an interlocutory order to be immediately appealable under § 1292(a)(1), however, a litigant must show more than that the order has the practical effect of refusing an injunction. Because § 1292 (a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly. . . . Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

450 U.S. at 84. This limitation on interlocutory review embodies the Court's view of "the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. . . . Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money." *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 181 (1955) (citation omitted).

The Second Circuit's decision here rejects this Court's limitations on appellate jurisdiction and conflicts with those circuits which have followed *Carson's* teachings.

### A. The Second Circuit's Decision in This Case Rests Upon a Misreading of *Carson* and a Disregard of Respondents' Failure to Seek Preliminary Injunctive Relief

The Second Circuit effectively held that the very dismissal of a claim which seeks ultimate injunctive relief satisfies the *Carson* test. *Volvo*, 839 F.2d at 75-76. Thus, in the Second Circuit, *every* order which has the "practical effect" of denying an injunction would be automatically appealable as of right. *Id.* This, petitioners submit, constitutes a serious misreading of *Carson*.

The Second Circuit found that the dismissal of respondents' claims had the "practical effect" of refusing an injunction. *Id.* at 73. The Second Circuit also found that, despite the fact that in over two years of litigating respondents never requested preliminary injunctive relief, the order dismissing their claim had "serious, perhaps irreparable consequence[s]" that could be "effectually challenged" only by immediate appeal. *Id.*

The Second Circuit reached this result by construing *Carson* to have kept intact the broad reading which lower courts had given to *General Electric Co.* v. *Marvel Rare Metals Co.,* 287 U.S. 430, 433 (1932), despite the fact that *Carson* has narrowed the application of *General Electric*. As one circuit court has explained, "While . . . the *Carson* Court did not overrule *General Electric,* a court need not overrule a prior case in order to clarify that case by stating a requirement which was met but not discussed. A court may refine holdings in its precedent which were stated or have been interpreted too broadly." *Woodard* v. *Sage Products, Inc.*, 818 F.2d at 851.

In *General Electric*, the Court held that the dismissal of a counterclaim requesting injunctive relief amounted to the

appealable refusal of an injunction because the decision resolved "the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction. . . . And the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction." 287 U.S. at 433. In *Carson*, the Court explained that its holding in *General Electric* was based upon the existence of a "serious, perhaps irreparable, consequence" to the counterclaim defendants if immediate appeal were denied. 450 U.S. at 86 n.11.

The Court in *Carson* also explained its holding in another decision on interlocutory appellate jurisdiction, *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966). There, the Court had held that the denial of the plaintiff's motion for summary judgment on claims seeking ultimate permanent injunctive relief was not appealable as an interlocutory denial of an injunction because it "does not settle or even tentatively decide anything about the merits of the claim. It is simply a pretrial order that decides only one thing—that the case should go to trial." 385 U.S. at 25. The *Carson* decision explained that the Court in *Switzerland Cheese* rejected interlocutory appellate jurisdiction because "[t]he motion for summary judgment sought permanent and not preliminary injunctive relief and petitioners did not argue that a denial of summary judgment would cause them irreparable harm *pendente lite*," and because "permanent injunctive relief might have been obtained after trial." 450 U.S. at 85.

Thus, in *Carson* the Court clarified its earlier decisions which had been given an overly expansive interpretation that the Second Circuit continues to apply. The *Carson* decision reiterated that interlocutory appellate jurisdiction

will lie only in very special circumstances—where a litigant can show that an order not only has the "practical effect" of denying a claim for injunctive relief, but also causes the litigant serious, irreparable injury which cannot be effectively challenged by review later in the litigation.

The Second Circuit failed to consider that *Carson* harmonized prior decisions of this Court to emphasize the need for a special showing of irreparable harm *pendente lite*. Instead, the Second Circuit retreated to earlier interpretations of *General Electric* and based interlocutory review here on the bare fact that the district court's Order "entirely disposed of the [respondents'] prayer for injunctive relief." *Volvo,* 839 F.2d at 75. The Second Circuit's opinion states:

> The dismissal of the antitrust counts of [respondents'] amended complaint without leave to replead decided that, in *Carson's* words (quoting *General Electric*), "upon the facts alleged [in their amended complaint, respondents] were not entitled to an injunction," and "resolved the very question that, among others, would have been presented to the courts upon formal application for an interlocutory injunction." Or as *Gardner* [v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)] put it, "[t]he order . . . entirely disposed of the [respondents'] prayer for injunctive relief." Accordingly, the irreparable harm which *Carson* found in *General Electric* is present here.

*Volvo,* 839 F.2d at 75-76. This holding—that respondents were entitled to interlocutory relief solely because their prayer for injunctive relief was dismissed—is in direct conflict with *Carson* and the rule of other circuits. *See* Point I, B, *infra*.

If the Second Circuit had properly interpreted *Carson* to require more than the effective denial of an injunction, the record developed in the district court should have compelled the court to dismiss the appeals.[8] The record demonstrated that (1) respondents failed to request preliminary injunctive relief in their Complaint, (2) in two years of litigation before their Complaint was dismissed, none of the respondents moved for a preliminary injunction against any of the petitioners, and (3) respondents have never made any effort to seek expedited treatment of their appeals to redress the allegedly "immediate" harm. By placing little or no weight on respondents' failure to pursue preliminary injunctive relief, the Second Circuit disregarded this Court's discussion of *Switzerland Cheese* in *Carson* which indicated that the denial of permanent injunctive relief does not present the need for interlocutory review presented by the denial of preliminary injunctive relief. 450 U.S. at 85-86.

The Second Circuit also refused to follow numerous other decisions which have similarly placed great emphasis on a party's failure to seek preliminary injunctive relief prior to the appeal and have stated that orders refusing requests for *permanent* injunctions do not threaten the type of injury that justifies immediate review. *See, e.g., Woodard* v.

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[8] Although it gave little consideration to the record of two years of litigation in the district court, the Second Circuit did give some consideration to respondents' supplementation of the record on appeal through the submission of affidavits in response to the motion to dismiss the appeals. In *dicta,* the court of appeals stated that such affidavits served to "fortify" its conclusion that interlocutory appeal was proper because claims for permanent injunctive relief had been dismissed. *See Volvo,* 839 F.2d at 76. Factual arguments on harm should not be resolved on appeal by affidavits, however, especially when those affidavits incorporate new factual material that was not presented to the district court and was never made the subject of a request or motion to amend the Complaint. *See Woodard* v. *Sage Products, Inc.,* 818 F.2d 841, 854 (Fed. Cir. 1987) (en banc).

*Sage Products, Inc.*, 818 F.2d 841, 851 (Fed. Cir. 1987) (en banc); *Shanks* v. *City of Dallas*, 752 F.2d 1092, 1097 n.6 (5th Cir. 1985); *South Bend Consumers Club, Inc.* v. *United States Consumers Club, Inc.*, 742 F.2d 392, 394 (7th Cir. 1984); *Commodity Futures Trading Commission* v. *Preferred Capital Investment Co.*, 664 F.2d 1316, 1319 n.4 (5th Cir. 1982); *Shirey* v. *Bensalem Township*, 663 F.2d 472, 476 (3rd Cir. 1981); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 18 (1st Cir. 1981); *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981).

In sum, by effectively eliminating the irreparable harm requirement for interlocutory review of orders which have the "practical effect" of refusing injunctions, the Second Circuit has expanded its jurisdictional reach at the expense of the orderly and efficient functioning of the district courts. Claimants will no longer be bound by the district court's determination of whether an interlocutory dismissal should be immediately appealed. Instead, they can ensure appellate jurisdiction by inserting in questionable claims a perfunctory request for permanent injunctive relief. The Second Circuit's drastic reinterpretation of section 1292(a)(1) and rejection of the express Congressional preference for finality prior to review should be passed upon by this Court.

### B. The Federal, First and Third Circuits' Decisions Properly Interpreted This Court's Holding in *Carson* to Prohibit Interlocutory Review Absent Serious, Irreparable Harm *Pendente Lite*

Three circuit courts have reached the conclusion opposite to that reached by the Second Circuit and have declined to extend appellate jurisdiction to interlocutory orders which merely dismiss claims that include a request for permanent injunctive relief. *See Woodard* v. *Sage Products, Inc.*, 818 F.2d 841, 852 (Fed. Cir. 1987) (en banc); *Shirey* v.

*Bensalem Township*, 663 F.2d 472, 477 (3d Cir. 1981); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 19 (1st Cir. 1981).

In *Woodard*, appeal was taken from a district court grant of summary judgment in favor of one of several defendants in a patent infringement action. The Federal Circuit sitting *en banc* held that, although the grant of summary judgment effectively denied permanent injunctive relief, it was not immediately appealable in the absence of some serious, irreparable consequence that could not be effectually challenged on appeal of a final judgment. The court interpreted *Carson* to apply to "all deemed injunctive orders," even those dismissing a claim for injunctive relief on the merits. *See* 818 F.2d at 851. The Federal Circuit found significant the factual context of the *Carson* decision, in which this Court permitted immediate review of the interlocutory refusal of a permanent injunction only after finding that irreparable harm would flow from the lost opportunity to execute a settlement agreement conditioned on the avoidance of a trial. *See id.* at 849.

Unlike the Second Circuit, the Federal Circuit recognized that this Court in *Carson* "went to great lengths to analyze its prior decisions and to fit them into the *Carson* analysis." *Id.* at 849. Hence, the Federal Circuit recognized that the Court's 1932 decision in *General Electric* no longer supports the proposition that every interlocutory order dismissing a complaint which requests permanent injunctive relief is immediately appealable as of right. Indeed, the Federal Circuit suggested that the *General Electric* decision *never* stood for that proposition:

> The *General Electric* Court did not hold that every order which entirely disposes of a claim for a permanent injunction is immediately appealable as of

> right. There, the appealed order was deemed one that denied a *preliminary* injunction, not a *permanent* injunction. . . . As with the specific denial of preliminary injunctive relief, the harm caused by an order which is deemed to deny a preliminary injunction cannot *effectually* be reviewed after the trial. By that time the question of relief or of maintaining the *status quo during* trial will have become moot. The denial of a *permanent* injunction does not necessarily have this element of harm, that is, effectual unreviewability after trial.

818 F.2d at 851 (emphasis in original). Thus, the Federal Circuit put the appellant in *Woodard* to the task of demonstrating the element of harm *pendente lite*. Because no adequate showing was made, the appeal was dismissed.

Significantly, like respondents here, the appellant in *Woodard* sought improperly to introduce on the motion to dismiss the appeal allegations of harm that were never put before the district court. The Federal Circuit refused to resolve the issue of irreparable harm in the first instance, instructing litigants that harm must be apparent from the record developed below and directing them to make use of the Rule 54(b) process where necessary to develop such a record. 818 F.2d at 854. The ruling stands in direct conflict to the Second Circuit's implicit result in *dicta* that it was entitled to refer to disputed factual affidavits in assessing serious, irreparable harm.

The Third Circuit has read *Carson* similarly. In *Shirey v. Bensalem Township*, one of four plaintiffs in a civil rights action appealed from an order dismissing the complaint, rather than amending his pleading as did his co-plaintiffs. The appellant argued that because the dismissed claim included a request for permanent injunctive relief, it was immediately appealable as of right under section

1292(a)(1). The Third Circuit rejected this argument and, applying *Carson's* serious, irreparable harm test, dismissed the appeal. *See* 663 F.2d at 475.

Noting that the "primary use [of section 1292(a)(1)] has been for appellate review of decisions on *preliminary* injunctions," *id.* at 476 (emphasis added), the Third Circuit found that the appellant's failure to seek a preliminary injunction or other interlocutory relief throughout the lawsuit refuted his allegations of harm:

> The party's own evaluation that there is no need for injunctive relief *pendente lite* is a good indication that the status quo can continue until the ultimate conclusion of the litigation without interlocutory appellate review. Thus, one of the factors which the Court has considered significant in determining whether the order falls within the class of "interlocutory" orders to which § 1292(a)(1) applies is whether the party has sought preliminary injunctive relief.

*Id.* (citing *Carson,* 450 U.S. at 89; *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478, 479 (1978)). By contrast, the Second Circuit in the present case gave virtually no weight to respondents' complacency during the two years between the filing of the Complaint and its dismissal.[9]

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[9] Respondents argued on the motion to dismiss in the Second Circuit that preliminary injunctive relief had been unnecessary because petitioners' conduct was restrained by the mere filing of the Complaint. Since the Complaint was dismissed on August 10, 1987, however, petitioners have been under no such restraint, and respondents have complained to the Second Circuit that petitioners have taken allegedly anticompetitive actions that were previously only threatened. Despite this, respondents have never even requested expedited treatment of their appeals and actually requested an extension of time to file their appellate briefs, thus demonstrating their continued complacency and refuting their protestations of immediate, irreparable harm.

The Third Circuit also concluded that because the district court's order in *Shirey* was not based on a "traditional balancing of the hardships and equities characteristic of a ruling on injunctive relief," it would be "exalting form over substance" to treat the order as one denying injunctive relief. 663 F.2d at 477. Recommending the use of Rule 54(b) and section 1292(b) for interlocutory appellate consideration of "limited issues," the Third Circuit admonished litigants that "Congress did not contemplate that § 1292(a)(1) would be utilized as a generally available route to interlocutory appeals merely because the complaint happens to request injunctive relief." *Id.* at 478. The Second Circuit has disregarded this clear Congressional intent and has permitted litigants to engage in just such a manipulation of the procedural rules governing appellate jurisdiction.

Finally, the First Circuit is in agreement with the Third and Federal Circuits' interpretation of *Carson.* In *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, the plaintiffs appealed an interlocutory order striking, on the merits, a request in a complaint preliminarily and permanently to enjoin the defendant from operating a nuclear power plant. In dismissing the appeal, the First Circuit noted that a preliminary injunction had been denied to the plaintiffs a year and a half before, and that they did not appeal from that earlier order, seek reconsideration of the issue, or renew their request for an interlocutory injunction. *See* 655 F.2d at 17-18. Because preliminary relief, as opposed to final injunctive relief, had become "a dead issue" in *Plymouth,* the First Circuit concluded:

> Under the circumstances, we think plaintiffs are hard pressed to demonstrate that the instant order has any *immediate* consequences of a serious nature, or that they will suffer "irreparable harm" pending

> final disposition of the case in the district court. . . . To be sure, the district court may have "finally" determined the "legal sufficiency" of plaintiffs claims for injunctive relief. . . . Even so, its order has the "practical effect" only of denying *permanent* injunctive relief, and as such may be "effectively challenged" on appeal from final judgment. Such an order, we think, is, despite whatever aspects of "finality" it may possess, immediately appealable only pursuant to Fed.R.Civ.P. 54(b) or 28 U.S.C. § 1292(b).

*Id.* at 18 (emphasis in original) (citations and footnotes omitted).

The well-considered decisions of the Federal, Third and First Circuit Courts of Appeals squarely conflict with the opinion of the Second Circuit. Only this Court can resolve that conflict. Thus, petitioners' writ should be granted.

### C. The Second Circuit's Decision Conflicts With the Clear Congressional Policy Against Piecemeal Review and Circumvents the Rule 54(b) Procedure

The Second Circuit's unsupported expansion of its jurisdiction to review interlocutory orders directly conflicts with the Congressional policy, codified at 28 U.S.C. § 1291 (1982), that the jurisdiction of the courts of appeals be limited to review of final judgments. It also circumvents the procedure established by Rule 54(b) which calls for any record on imminent harm justifying interlocutory review to be developed in the district court.

The final judgment rule has been a basic principle of our jurisprudence since the Judiciary Act of 1789, 1 Stat. 73, 84. In *McLish* v. *Roff*, 141 U.S. 661, 665-66 (1891), the Court identified the following reasons for this policy:

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

Thus, the final judgment rule prefers the prospect of a retrial following appeal to piecemeal interlocutory review.

In 1891, Congress created the first exception to the rule of finality with the creation of the circuit courts of appeals. As observed in *Baltimore Contractors, Inc.* v. *Bodinger*, this exception

> allowed appeals from interlocutory orders in equity "granting or continuing" injunctions, but from those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of § 1292 in its present form. No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.

348 U.S. at 180-81 (footnotes omitted). The Court remarked that the further enlargement of interlocutory appellate jurisdiction should be left to Congress which "is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants." *Id.* at 181.

In *Stringfellow* v. *Concerned Neighbors in Action*, — U.S. —, 107 S. Ct. 1177, 1184 (1987), this Court reiterated the importance of the final judgment rule in protect-

ing "a variety of interests that contribute to the efficiency of the legal system":

> Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. [368,] 374, 101 S. Ct. [669,] 673 [(1981)]. Particularly in a complex case such as this, a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference. . . . The judge's ability to conduct efficient and orderly trials would be frustrated, rather than furthered, by piecemeal review.

It was for these very reasons that Congress enacted Rule 54(b) of the Federal Rules of Civil Procedure, entrusting to the district court—the court better equipped to determine the need for interlocutory review—that determination. *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8-11 (1980) (determination of Rule 54(b) certification is commended to the sound discretion of the district court and should be reversed only if clearly unreasonable). Under Rule 54(b), the district court may direct the entry of final judgment and certify an immediate appeal of what would otherwise be an unappealable interlocutory order, upon the determination that "there is no just reason for delay." [10]

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[10] In the present case, respondents initially did not seek the entry of final judgment under Rule 54(b), but proceeded to appeal the

*(footnote continued on following page)*

The Second Circuit's decision in this case reverses the basic presumption against interlocutory appeals. By permitting review of *every* interlocutory order that dismisses a claim which requests permanent injunctive relief, the Second Circuit contravenes the express Congressional rejection of piecemeal review set forth in section 1292(a)(1) and this Court's interpretation of that statutory provision in *Carson*. The Second Circuit's decision also eschews reliance on the Rule 54(b) certification procedure, expressing disdain rather than "great deference" for the district courts' trial management skills. *See Stringfellow* v. *Concerned Neighbors in Action,* 107 S. Ct. at 1184. This judicial modification of statutory authority favoring finality requires review and reversal.

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*(footnote continued from preceding page)*

non-final Order alleging jurisdiction under section 1292(a)(1). Subsequently, respondents made an oral request for a Rule 54(b) finding on September 29, 1987, without attempting to develop any factual record of harm. The district court denied that request.

## CONCLUSION

For all the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 6, 1988

Respectfully submitted,

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# APPENDIX

**Opinion of the Court of Appeals**
**February 8, 1988**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August Term, 1987

(Argued: October 20, 1987 Decided: February 8, 1988)
Docket Nos. 87-7776, 87-7778, 87-7784

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VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION and PROSERV, INC.,

*Plaintiffs-Appellants,*

—against—

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER, III and PHILIPPE CHATRIER,

*Defendants-Appellees.*

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MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL and M. MARSHALL HAPPER, III,

*Counterclaimants,*

—against—

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION and PROSERV, INC.,

*Counterclaim-Defendants,*

—and—

DONALD L. DELL, RAYMOND S. BENTON, DELL, BENTON & FALK, MARK H. MCCORMACK, INTERNATIONAL MERCHANDISING GROUP, INTERNATIONAL MANAGEMENT INC., TRANSWORLD INTERNATIONAL INC., and A.B. VOLVO,

*Additional Counterclaim-Defendants.*

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*Opinion of the Court of Appeals—February 8, 1988*

Before:

OAKES, CARDAMORE, and MAHONEY,

*Circuit Judges.*

Motion to dismiss consolidated appeals from an order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge,* which dismissed a thirteen count complaint seeking damages and injunctive relief, and denied leave to replead counts one through seven and thirteen thereof (which counts encompassed all claims of alleged antitrust violations). Movants contend that the dismissal below does not constitute the refusal of an injunction, and therefore this court lacks jurisdiction over the appeal under 28 U.S.C. § 1292(a)(1) (1982), which provides for appeal as of right from interlocutory orders refusing injunctions.

Motion granted as to counts eight through twelve, which were dismissed with leave to replead, as well as count thirteen, which does not seek injunctive relief, and denied as to counts one through seven, which seek injunctive relief and were dismissed without leave to replead.

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ROBERT S. LITT, Washington, D.C. (Williams & Connolly, Mark S. Levinstein, William R. Murray, Jr., Washington, D.C., of counsel), *for Plaintiff-Appellant ProServ, Inc.*

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MAHONEY, *Circuit Judge*:

Defendants-appellees, Men's International Professional Tennis Council, M. Marshall Happer, III and Phillippe Chatrier (collectively "MIPTC"), move to dismiss the consolidated appeals of plaintiffs-appellants Volvo North America Corporation ("Volvo"), International Merchandising Corporation ("IMC") and ProServ, Inc. ("ProServ") for lack of jurisdiction over the appeals. The appeals were taken from a memorandum and order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge,* entered August 10, 1987, which dismissed, pursuant to Fed. R. Civ. P. 12(b)(6),[1] plaintiffs-appellants' thirteen count amended complaint alleging various antitrust violations injuring all plaintiffs-appellants, and various contractual and related violations injuring Volvo alone, and requesting damages and injunctive relief relating to various practices in which MIPTC allegedly engages with respect to its conduct and

[1] The district court's memorandum and order from which this appeal is taken described the motion on which that court ruled at several places as one for summary judgment, but this appears to have been simply a misnomer for a Rule 12(b)(6) motion.

promotion of the Grand Prix Circuit ("Grand Prix"), a series of men's professional tennis tournaments.

Specifically, counts one through seven and thirteen were dismissed without leave to replead, and are those primarily at issue on this appeal. The action below remains open pending the determination of counterclaims (as well, of course, as any of counts eight through twelve of the dismissed complaint that may be repleaded). Judge Duffy declined to enter any final judgment pursuant to Fed. R. Civ. P. 54(b), so appellate jurisdiction will not lie under 28 U.S.C. § 1291 (1982). MIPTC contends that the dismissal of the amended complaint does not constitute the refusal of an injunction, and thus that there is also no jurisdiction over the appeals under 28 U.S.C. § 1292(a)(1) (1982), which provides for immediate appeal of interlocutory orders that grant, continue, modify, refuse or dissolve injunctions, or refuse to dissolve or modify them.

We grant the motion to dismiss the appeal as to counts eight through twelve, which were dismissed with leave to replead, as well as count thirteen, which does not seek injunctive relief, and deny the motion as to counts one through seven, which seek injunctive relief and were dismissed without leave to replead.

## Background

This case stems from a dispute between MIPTC, an unincorporated association that, since 1974, has organized and overseen the Grand Prix, and Volvo, which from 1980 through 1984 was the overall sponsor of the Grand Prix. In February, 1984, following contract bids, the MIPTC named Nabisco Brands, Inc. as the 1985 Grand Prix sponsor. Volvo then entered into an agreement with MIPTC

(the "Agreement") whereby Volvo assigned its then existing contracts with NBC and Madison Square Garden to MIPTC in exchange for subsidiary sponsorship of several individual Grand Prix events, and Volvo and MIPTC agreed to cooperate with each other's reasonable promotional activities.

In April, 1985, however, Volvo filed suit against MIPTC over the discontinued sponsorship and subsequent arrangements. In September, 1985, IMC and ProServ, which engage both in the representation of male professional tennis players and the production of men's professional tennis events, were allowed to intervene over the objections of MIPTC, and plaintiffs-appellants were granted leave to file the amended complaint whose dismissal is the subject of this appeal.

Counts one through five of the amended complaint allege various violations of federal antitrust statutes by MIPTC injuring all plaintiffs. The gravaman of the antitrust allegations is that MIPTC controls access to the major men's professional tournaments, and has used this control to impose restrictions upon male professional tennis players which hamper the ability of actual and potential competitors of MIPTC to conduct competiting tennis events. Count six alleges interferences with prospective business relationships, and count seven unfair competition, again injuring all plaintiffs. Treble damages are sought with respect to counts one through five, compensatory and punitive damages are sought with respect to counts six and seven, and declaratory and extensive injunctive relief are sought with respect to all seven counts.

Counts eight through thirteen are alleged only by Volvo, and assert breach of contract (counts eight and ten), fraud (counts nine and eleven), defamation (count twelve) and

product disparagement (count thirteen). Damages are sought with respect to all these counts, as well as limited injunctive relief under counts ten and eleven relating to alleged breaches of the Agreement by MIPTC and related matters.

MIPTC moved to dismiss the amended complaint, and the district court granted that motion by a memorandum and order filed August 10, 1987. Leave to replead was denied with respect to counts one through seven and thirteen, but granted with respect to counts eight through twelve.

Plaintiffs-appellants filed appeals from the order of dismissal on September 8 and 9, 1987. Shortly thereafter, the district court declined to enter any final judgment pursuant to Fed. R. Civ. P. 54(b).[2] MIPTC now moves to dismiss the appeals, claiming that this court lacks jurisdiction over the appeals because they are not taken from a final order pursuant to 28 U.S.C. § 1291 (1982), and also do not qualify under 28 U.S.C. § 1292(a)(1) (1982), which provides for the immediate appeal of interlocutory orders that grant, continue, modify, refuse or dissolve injunctions, or refuse to dissolve or modify them. Plaintiffs-appellants contend that the order dismissing the claims is appealable as of right under 28 U.S.C. § 1292(a)(1)

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[2] A Rule 54(b) certification by Judge Duffy at this juncture would apparently be honored in this circuit, *Gumer v. Shearson, Hammill & Co.*, 516 F.2d 283, 285 (2d Cir. 1974); *see also Leonhard v. United States*, 633 F.2d 599, 609-11 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981), although this is not the universal rule. *See, e.g., Kirkland v. J. Ray McDermott & Co.*, 568 F.2d 1166, 1169 (5th Cir. 1978); *Oak Constr. Co. v. Huron Cement Co.*, 475 F.2d 1220, 1221 (6th Cir. 1973) (per curiam). We do not mean to imply by this comment that a post-appeal request for Rule 54(b) certification is generally sound practice.

(1982) because it refuses an injunction within the meaning of that provision.

Discussion

In determining whether this court has jurisdiction over these appeals, we must begin with the statutory provision at issue. 28 U.S.C. § 1292(a)(1)(1982) states in pertinent part:

> § 1292. Interlocutory decisions
> (a) . . . [T]he courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . .

This statute provides an exception to the longstanding rule, codified in 28 U.S.C. § 1291 (1982), that appeals should generally be taken only from a final judgment of a district court. The policy underlying this rule was stated by the Supreme Court in *McLish v. Roff*, 141 U.S. 661 (1891):

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

*Id.* at 665-66 (citation omitted). *See also Stringfellow v. Concerned Neighbors in Action*, — U.S. ——, ——, 107 S. Ct. 1177, 1184 (1987).

The exception for certain appeals from interlocutory orders dealing with injunctions was first introduced in 1891, and has developed over the years into the present enactment codified in 28 U.S.C. § 1292(a)(1) (1982). *See generally Baltimore Contractors v. Bodinger,* 348 U.S. 176, 180 & n.6 (1955) (discussing history of section 1292).

Plaintiffs-appellants contend that the present appeal falls squarely within the terms of section 1292(a)(1). MIPTC contends, on the contrary, that this section has been definitely construed in *Carson v. American Brands, Inc.,* 450 U.S. 79 (1982) (hereinafter *"Carson"*), so as to preclude appellate jurisdiction in the present case.

Before dealing with *Carson,* however, we must consider *General Electric Co. v. Marvel Rare Metals Co.,* 287 U.S. 430 (1932) (hereinafter *"General Electric"*), which is very closely on point. In *General Electric,* a defendant in a patent infringement suit counterclaimed for patent infringement, seeking an injunction and accounting, and the counterclaim was dismissed on plaintiffs' motion for want of personal jurisdiction over the plaintiffs. Defendant appealed, successfully contending in both the Sixth Circuit Court of Appeals and the Supreme Court for the sensible result that plaintiffs could not, under the pertinent statutes and rule, simultaneously invoke the jurisdiction of the district court of the district court as plaintiffs and avoid personal jurisdiction as counterclaim defendants. Preliminarily, however, the Supreme Court had to deal with plaintiffs' claim that appellate jurisdiction was wanting under the terms of the substantially identical predecessor of 28 U.S.C. § 1292(a)(1) (1982). It did so in the following terms:

> [B]y their motion to dismiss, plaintiffs themselves brought on for hearing the very question that,

> among others, would have been presented to the court upon formal application for an interlocutory injunction. That is, whether the allegations of the answer are sufficient to constitute a cause of action for injunction. And the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer.

*General Electric*, 287 U.S. at 433.

In *Carson,* however, the Supreme Court, in reviewing a district court's order denying a motion to enter a consent decree which included injunctive provisions, announced this rule:

> For an interlocutory order to be immediately appealable under § 1292(a)(1), . . . a litigant must show more than that the order has the *practical effect* of refusing an injunction . . . . Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

*Carson,* 450 U.S. at 78 (emphasis added) (quoting *Baltimore Contractors v. Bodinger,* 348 U.S. 176, 181 (1955)).[3]

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[3] The rule stated in *Carson* was recently reiterated by the Supreme Court, without significant elaboration, in *Stringefellow v. Concerned Neighbors in Action,* —— U.S. ——, 107 S. Ct. 1177 (1987), where an appeal from an order conditioning intervention was dismissed, applying the *Carson* criteria.

In reviewing the Supreme Court's prior precedents on this subject, the *Carson* court addressed *General Electric* as follows:

> *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932), a case in which respondents sought to appeal the District Court's dismissal of their counterclaim for injunctive relief on jurisdictional grounds, concluded that the District Court's order *did* have a serious, perhaps irreparable, consequence and that it could not be effectually challenged unless an appeal were immediately taken. The Court noted that the District Court "necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction," *id.*, at 433, 53 S. Ct., at 204, and that this decision resolved "the very question presented to the court upon formal application for an interlocutory injunction." *Ibid.*

*Carson,* 450 U.S. at 86 n.11 (emphasis in original).

Plaintiffs-appellants contend that (1) *Carson* applies only with respect to interlocutory orders which have the "practical effect" of refusing an injunction, while the final dismissal here constitutes an explicit refusal of an injunction governed by *General Electric,* to which *Carson* is simply inapplicable; and in any event, (2) they have met the requirements of *Carson* because the district court's final dismissal of the antitrust counts of their complaint is of "serious, perhaps irreparable consequence" and can be "effectually challenged" only by immediate appeal.

MIPTC contends that (1) the rule stated in *Carson* applies to all interlocutory orders which refuse an injunction; (2) alternatively, the final dismissal here does not

directly rule on an application for an injunction, and must therefore be tested under the "practical effect" rule of *Carson* requiring serious or irreparable consequences which can only be challenged by immediate appeal; and in either event, (3) plaintiffs-appellants have not satisfied the *Carson* test.

For the reasons hereinafter stated, we conclude that the ruling below did not explicitly refuse an injunction, and must therefore be tested under the *Carson* "practical effect" analysis,[4] but plaintiffs-appellants have succeeded in establishing that the dismissal from which they appeal is of "serious, perhaps, irreparable consequence" and can be "effectually challenged" only by immediate appeal.

*Carson* has spawned an array of circuit court opinions which have attempted to cope with its implications. The post-*Carson* cases in this circuit construing section 1292(a)(1) are not particularly helpful to the resolution of the issue which we must address. *H&S Plumbing Supplies, Inc. v. BancAmerica Commercial Corp.*, 830 F.2d 4, 7 (2d Cir. 1987), saw no irreparable consequences resulting from a refusal to cancel a lis pendens pending resolution of the underlying litigation. *Korea Shipping Corp. v. New York Shipping Ass'n*, 811 F.2d 124 (2d Cir. 1987), held that an order requiring the continuation of payments to a pension benefit plan pending the adjudication of a party's continuing obligations respecting that plan had the "practical effect" of a preliminary injunction, but did not meet the *Carson* test for appellate jurisdiction. *United States v. Caparros*, 800 F.2d 23, 26 (2d Cir. 1986), held that an interlocutory protective order precluding defendant from publicizing

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[4] It is therefore unnecessary to determine in this opinion whether *Carson* applies to all interlocutory orders which refuse an injunction.

documents provided for him by the government threatened no irreparable harm warranting appellate jurisdiction.

*General Motors Corp. v. Gibson Chemical & Oil Corp.*, 786 F.2d 105, 107-08 (2d Cir. 1986), deemed the interlocutory grant of a preliminary injunction to plaintiff "which touches upon the merits of [plaintiff's] claim" immediately appealable, but deemed a seizure order not to meet the requirements of *Carson. In Re Feit & Drexler, Inc.*, 760 F.2d 406, 411-13 (2d Cir. 1985), held that an interlocutory order restraining a defendant from disposing of any of her property and directing delivery of all her property to her attorney in escrow *pendente lite* met the *Carson* test for immediate appeal. *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940 (2d Cir. 1983), declined section 1292(a)(1) jurisdiction over an appeal from an interlocutory order regulating disclosure without citing *Carson. New York v. Dairylea Coop, Inc.* 698 F.2d 567 (2d Cir. 1983), deemed an interlocutory appeal from a district court's refusal to sanction a proposed settlement agreement not to meet the requirements of *Carson.*

*General Motors* comes closest to our case, in its assertion that the grant of a preliminary injunction to plaintiff "which touches upon the merits of [plaintiff's] claim is, of course, reviewable." 786 F.2d at 108 (citation omitted). Some of the cases construing *Carson* have ruled that where an order directly addresses the merits, as Judge Duffy's order here surely did, an appeal may be taken without regard to considerations of irreparable harm. *See e.g., Winterland Concessions Co. v. Trela,* 735 F.2d 257, 261 (7th Cir. 1984) (order dismissing counterclaims which sought injunctive relief appealable without consideration of irreparable harm); *Center for Nat'l Sec. Studies v. C.I.A.*, 711

F.2d 409, 412 (D.C. Cir. 1983) (order granting summary judgment as to count of complaint appealable without consideration of irreparable harm). *See also Tokarcik v. Forest Hills School Dist.,* 665 F.2d 443, 447 (3d Cir. 1981) (order granting summary judgment to plaintiff including injunctive relief "which went to the merits of the dispute" deemed appealable, but defendant's claim of irreparable harm considered). *Cf. Center for Nat'l Sec. Studies* v. *C.I.A.,* 711 F.2d at 412-13 (stating rule that an order directly addressing merits is appealable without a showing of irreparable harm, but applying *Carson* requirements and denying jurisdiction because merits of only one of plaintiff's twelve claims were assessed below).

*General Motors* is not dispositive here, however, because that case involved a straightforward grant of a motion for a *preliminary* injunction, whereas here we have an order which does not respond to a specific application for injunction relief, but rather grants summary judgment which has the "practical effect" of definitively denying the permanent injunctive relief sought by plaintiffs-appellants with respect to their antitrust claims (since leave to replead was denied as to those claims). A number of cases have stated that appeal under section 1292(a)(1) is more appropriate with respect to preliminary than to permanent injunctive relief. *See e.g., Woodard v. Sage,* 818 F.2d 841, 851 (Fed. Cir. 1987) (in banc) (denial of preliminary injunction cannot effectively be reviewed after trial, but denial of permanent injunction does not necessarily have this element of harm); *Shanks v. Dallas,* 752 F.2d 1092, 1097 & n.6 (5th Cir. 1985) (denial of permanent injunction usually carries a lesser threat of irreparable harm since full injunctive relief can be granted on appeal); *Shirey v. Bensalemn Township,* 663 F.2d 472, 476 (3d Cir. 1981) (primary use of section

1292(a)(1) has been for appellate review of decisions on preliminary injunctions).

We note also that some of the cases assert that a failure to pursue preliminary injunctive relief, as occurred here, militates against interlocutory appellate review. *See, e.g., South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 394 (7th Cir. 1984); *Shirey v. Bensalem Township,* 663 F.2d 472, 476-77 (3d Cir. 1981). *But see Brown v. Kerr- McGee Chemical Corp.,* 767 F.2d 1234, 1240 (7th Cir. 1985), *cert. denied,* 475 U.S. 1066 (1986) (failure to seek preliminary injunctive relief held not to bar plaintiff from seeking appellate relief from interlocutory order granting partial summary judgment to defendant where preliminary relief impractical). Plaintiffs-appellants contend that the initiation of this litigation had the effect of deterring MIPTC from pursuing the activities which threatened harm to plaintiffs-appellants, so the necessary showing of imminent harm could not have been made in support of an application for a preliminary injunction. On this record, we cannot conclude that plaintiffs-appellants' failure to seek preliminary injunctive relief below should bar this appeal.

We thus return to the applicability of *General Electric,* and the impact of *Carson* on *General Electric.* In the first place, we would agree that since *General Electric* (and this appeal) did not involve the grant or denial of a motion specifically addressed to injunctive relief, it is a case where the "practical effect" of the order was to refuse an injunction within the meaning of *Carson. Carson,* 450 U.S. at 84. *See also Woodard v. Sage,* 818 F.2d 841, 845 (Fed. Cir. 1987) (in banc); *Brown v. Kerr-McGee Chemical Corp.,* 767 F.2d 1234, 1237 (7th Cir. 1985); *In Re Flight Transp. Corp. Sec. Litig.,* 730 F.2d 1128, 1133 (9th Cir.

1984), *cert. denied,* 469 U.S. 1207 (1985); *Center for Nat'l Sec. Studies v. C.I.A.*, 711 F.2d 409, 412 (D.C. Cir. 1983). Thus, cases factually similar to *General Electric,* such as the instant appeal, would be subjected to the *Carson* requirements.

This is perhaps another way of arriving at the view expressed in *Woodard v. Sage,* 818 F.2d 841, 851 (Fed. Cir. 1987) (in banc), that *Carson* "clarif[ied *General Electric*] by stating a requirement that was met but not discussed" in *General Electric.* The precise terms of that clarification, however, are crucial to the resolution of the issue before this court. *Carson* stated that *General Electric* did in fact find irreparable harm resulting from an order that could not be effectually challenged unless immediate appeal was allowed, because:

> The Court [in General Electric] noted that the District Court "necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction," *id.* [*i.e.,* 287 U.S.], at 433, 53 S. Ct., at 204, and that this decision "resolved the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction." [5]

[5] We note that the concluding portion of this *Carson* quotation from *General Electric* lends further support to our conclusion that a section 1292(a)(1) appeal should not be denied here because of plaintiffs-appellants' failure to seek preliminary injunctive relief below. In *General Electric,* as here, no application for preliminary injunctive relief had been made by the parties whose claim was dismissed on motion, but the Supreme Court simply observed that the same question was presented by the motion to dismiss that would have been presented had the counterclaimants moved for a preliminary injunction.

Carson, 450 U.S. at 86 n.11 (quoting *General Electric*). *See also Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 481 (1978): "In [*General Electric*] the Court held that an order dismissing a counterclaim for an injunction was appealable. The order, therefore, entirely disposed of the defendant's prayer for injunctive relief . . . ."

So here. The dismissal of the antitrust counts of plaintiffs-appellants' amended complaint without leave to replead decided that, in *Carson's* words (quoting *General Electric*), "upon the facts alleged [in their amended complaint, plaintiffs-appellants] were not entitled to an injunction," and "resolved the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction." Or as *Gardner* put it, "[t]he order . . . entirely disposed of the [plaintiffs-appellants'] prayer for injunctive relief." Accordingly, the irreparable harm which *Carson* found in *General Electric* is present here.

This conclusion is fortified by consideration of the affidavits which plaintiffs-appellants have submitted in opposition to this motion. Plaintiffs-appellants assert, inter alia, that MIPTC has refused to renew the sanction for a Chicago tournament which Volvo has conducted in the past, and has adopted new rules which preclude any tournament to be part of the Grand Prix if an entity which represents players owns, has an equity interest in, or manages the tournament. IMC and ProServ are thus situated, both representing male professional tennis players and owning, having an equity interest in or managing tennis tournaments.

In view of the pervasive influence of MIPTC over men's professional tennis tournaments, plaintiffs-appellants argue convincingly that if review of their dismissed antitrust

claims is deferred until the conclusion of the potentially protracted litigation pending below, these restrictions are likely to have a serious and irreparable impact upon their ability to compete with MIPTC in the conduct of men's professional tennis tournaments, and that the order dismissing their antitrust claims can therefore be effectually challenged only by an immediate appeal. Not only, therefore, are the general standards articulated in *General Electric* and reiterated in *Carson* met here; there is also a persuasive showing of specific and irreparable harm which will result from a failure to exercise appellate jurisdiction at this juncture, which is likely to render ineffectual any relief that might result from an appeal from a final judgment in the litigation pending below.

We note that the decision below did not dispose of all of plaintiffs-appellants' claims for injunctive relief, since leave to replead was afforded as to counts ten and eleven, with respect to which Volvo (but not the other plaintiffs-appellants) sought relatively limited injunctive relief relating primarily to the Agreement. As in *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 283 (2d Cir. 1971), however, the severe limitation of the injunctive relief sought suffices for appellate jurisdiction. *See Winterland Concessions Co. v. Trela*, 735 F.2d 257, 261 (7th Cir. 1984) (citing *Build of Buffalo* for this rule). *Contrast Western Geophysical Co. v. Bolt*, 440 F.2d 765, 771 (2d Cir. 1971) (no appellate jurisdiction where partial summary judgment dismissed portion of a counterclaim, but equivalent injunctive relief available under remaining counterclaims).

In this connection, we do not believe that pendent appellate jurisdiction should be extended to the claims for injunctive relief stated with respect to counts ten and

eleven, as to which leave to replead was granted,[6] in view of the disparity between Volvo's individual, essentially contractual claims stated in those counts and the broader antitrust claims stated by all plaintiffs-appellants in counts one through seven. *Cf. United States v. Ianniello,* 824 F.2d 203, 209 (2d Cir. 1987) (pendent appellate jurisdiction appropriate where issues intertwined).

Finally, we note that the panel which hears this appeal on the merits may wish to consider the views concerning the scope of such appeals expressed in *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1472 (11th Cir. 1985).[7]

## Conclusion

The motion to dismiss the appeal is granted as to counts eight through thirteen of plaintiffs-appellants' amended complaint, and denied as to counts one through seven thereof.

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[6] An appropriate analogy may be provided by *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.,* 385 U.S. 23 (1966), which dismissed an appeal from an order which denied, because of unresolved issues of fact, a motion for summary judgment which sought injunctive relief "lest a floodgate be opened that brings into the exception [provided by section 1292(a)(1)] many pretrial orders." *Id.* at 24-25. Since the case is not before us, we intimate no view as to the appropriate rule where leave to replead is granted but the litigant elects to stand on his pleading. *See Electronic Switching Indus., Inc. v. Faradyne Electronics Corp.,* 833 F.2d 418 (2d Cir. 1987); *Borelli v. Reading,* 532 F.2d 950 (3d Cir. 1976).

[7] We also note *Cable Holdings'* admonition, 764 F.2d at 1472, that "we should not encourage the practice of appending perfunctory requests for injunctive relief to complaints as a device to secure immediate appeal of all orders," an admonition which we are confident this court would enforce in an appropriate case.

(2)

No. 87-1823



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,

*Petitioners,*

v.

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION AND PROSERV, INC.,

*Respondents.*

## SUPPLEMENTAL APPENDIX

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27 pp

**Opinion of the District Court**
**August 10, 1987**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 2959 (KTD)

VOLVO NORTH AMERICA CORPORATION,
INTERNATIONAL MERCHANDISING CORPORATION,
and PROSERV, INC.,

*Plaintiffs,*

—against—

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL,
M. MARSHALL HAPPER, III and PHILIPPE CHATRIER,

*Defendants.*

MEMORANDUM AND ORDER

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*Opinion of the District Court—August 10, 1987*

KEVIN THOMAS DUFFY, D.J.:

The decision on this motion for summary judgment submitted in January of 1986 has been a long time in coming. The reason for this is that I had difficulty (as often happens) in articulating the obvious. Sometimes it is necessary to explain the obvious, something that district court judges are competent to do. *Cuisinarts, Inc.* v. *Robot-Coupe International Corp.*, 509 F. Supp. 1036, 1043 (S.D.N.Y. 1981). It is necessary in this case.

When hiring an employee, an employer may make that employment dependent on certain conditions. Such conditions may include length and hours of employment, rate of pay, vacation time, sick leave policies, and restrictions on whether the employee may work at other jobs, so long as they are not imposed for longer than a reasonable period of time. The employment contracts at issue bind the employee tennis players to such conditions for a period of approximately thirty-six weeks per year. The basic charge here is that these employment contracts for tennis players preclude the plaintiffs from hiring those players during that period, so that plaintiffs cannot successfully compete in exhibiting those players. Sophist arguments advanced by plaintiffs would turn this into an illegal monopoly and a violation of the antitrust laws. The real relief sought by plaintiffs is a declaration by this court that exclusive employment contracts even for a reasonable period of time monopolize the employees' time and are thus illegal. With this in mind, a more detailed recitation of the facts presented here is appropriate.

## FACTS

Plaintiffs, Volvo North America Corporation ("Volvo"), International Merchandising Corporation ("IMC"), and

ProServ, Inc. ("ProServ"), bring this action against defendants, Men's International Professional Tennis Council ("MIPTC"), M. Marshall Happer, III, (MIPTC's Administrator), and Philippe Chatrier, (MIPTC's Chairman), alleging, *inter alia,* violations of the federal antitrust laws. Defendants now move: (1) to dismiss the entire complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or, in the alternative, (2) to dismiss Volvo's fraud claims pursuant to Fed. R. Civ. P. 9(b) for failure to plead fraud with particularity, and (3) to dismiss certain portions of the complaint pursuant to Fed. R. Civ. P. 12(b)(1) because they are not ripe for adjudication.

Defendant MIPTC is an unincorporated association that has, since 1974, organized and overseen the Grand Prix Circuit ("Grand Prix"), a series of men's professional tennis tournaments. Defendants Happer and Chatrier are officers of MIPTC. MIPTC is a nine-member council comprised of three representatives of the International Tennis Federation ("ITF"), three representatives of the players, one representative of the North American tournament directors, one representative of European tournament directors, and one representative of the directors of all other MIPTC-sanctioned tournaments. Plaintiff Volvo is a corporation principally engaged in the production of automobiles and trucks, but it also produces and sponsors men's professional tennis events. Plaintiffs IMC and ProServ are corporations engaged in the management of professional athletes, including men's professional tennis players. Both IMC and ProServ are also in the business of producing men's professional tennis events, and it is in this capacity that they bring this suit. Therefore this memorandum will deal with all three plaintiffs solely as producers of men's professional tennis

events, and will not address IMC's and ProServ's status as player-agents.

The production of men's professional tennis events generally involves several parties. The "owner" of the event is obligated to pay the expenses of the event, including players compensation and the facility costs where the event is played, and is entitled to receive revenues generated by the event. Often the owner contracts with other parties to handle some or all of the functions of producing the event, such as: player-agents, advertisers, parties to market television broadcast rights, sponsorship rights, concessions, programs, and other products associated with the event, or parties to manage the events' day-to-day operations.

Individual men's professional tennis events can involve several different sponsors. The "title" sponsor purchases the right to have its name included in the title of the event. The "presenting" sponsor purchases the right to have the event identified and advertised as "presented by" that sponsor. "Secondary sponsors" pay for other subsidiary sponsorship rights such as the right to have the sponsor's product identified and advertised as the "official product" of the event. Sponsorship rights usually also include such benefits as tickets to attend the event, the right to post banners and distribute promotional materials at the event site, and to advertise in the event program.

From 1980 through 1984, Volvo purchased the rights to have its name identified as the overall sponsor of the Grand Prix. Other subsidiary sponsors also present and sponsor individual Grand Prix events. Although Volvo sponsored the Grand Prix, it did not assume responsibility for the management of the various events nor did it develop any of the tournament's rules. Apparently, MIPTC was responsible for sanctioning and scheduling all Grand Prix events. In

January of 1984, Volvo sought to continue its sponsorship of the Grand Prix and submitted a sponsorship bid to MIPTC. Nabisco Brands, Inc. ("Nabisco") also submitted a bid to MIPTC to become the Grand Prix sponsor. On February 1, 1984, MIPTC announced that Nabisco would become the 1985 Grand Prix sponsor.

Because of Volvo's 1980 through 1984 Grand Prix sponsorship, and its assumption that its sponsorship would continue, it acquired contractual rights to the use of Madison Square Garden for the January 1985 Masters Tournament, and had contracted with NBC to televise the Masters Tournament during that week in future years. Because its Grand Prix sponsorship ended in 1984, Volvo contracted with MIPTC in 1985 (the "1985 Agreement") to assign its contracts with Madison Square Garden and NBC to MIPTC. In return, MIPTC agreed to sanction Volvo's subsidiary sponsorship of several individual Grand Prix events. Both MIPTC and Volvo agreed to cooperate with each other's reasonable promotional activities.

In July 1985, plaintiffs Volvo, IMC and ProServ initiated this action against defendants MIPTC and two of its officers. The complaint essentially alleges eight causes of action against the defendants. All three plaintiffs claim that defendants' acts constitute:

(1) a combination and conspiracy to restrain trade, and a group boycott in violation of the Sherman Act, 15 U.S.C. § 1 (1982 & Supp. III 1985);[1]

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[1] 15 U.S.C. § 1 provides that:

> [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be

*(footnote continued on following page)*

(2) a combination, conspiracy and attempt to monopolize trade in violation of the Sherman Act, 15 U.S.C. § 2 (1982);[2]

(3) interference with prospective business relationships; and

(4) unfair competition.

Plaintiff Volvo alleges that defendants' acts constitute the following causes of action against it individually:

(5) breach of MIPTC's bidding conditions for the 1985 Grand Prix sponsorship, and of the 1985 Agreement;

(6) fraud;

(7) defamation; and

(8) product disparagement.

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*(footnote continued from preceding page)*

> illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[2] 15 U.S.C. § 2 provides that:

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

*Claims Asserted by Volvo, IMC, and ProServ*

Plaintiffs' antitrust and unfair competition claims essentially hinge on their allegation that MIPTC has combined and conspired to monopolize and restrain trade and compete unfairly in men's professional tennis. Plaintiffs contend that they are current and potential competitors of MIPTC and that MIPTC is preventing them and any other entity from creating and successfully operating an alternate tennis circuit to the Grand Prix. They assert that MIPTC is using three methods to accomplish this: (1) agreements with World Championship Tennis, Inc. ("WCT"); (2) the use of player-commitment contracts; and (3) the proposed implementation of certain rules. Plaintiffs also contend that defendants' antitrust conduct constitutes interference with prospective business relationships.

The only co-conspirator named in the complaint is the ITF. The ITF formed MIPTC originally, participates in MIPTC's operation, and ITF members make up one-third of MIPTC. Because ITF makes up part of MIPTC, and because it is legally impossible to conspire with oneself, *United States* v. *Gisehaltz,* 278 F. Supp. 434, 437 (S.D.N.Y. 1967), plaintiffs can make out no claim of conspiracy to restrain trade or to monopolize against ITF and MIPTC. Plaintiffs also allege that other co-conspirators exist, "some of whom may not be known to the plaintiffs at this time." First Amended Complaint, at ¶ 8. However, no conspiracy claim can stand against unidentified and unknown parties.

First, plaintiffs claim that WCT produced a series of tennis events competitive with the Grand Prix, and that defendants responded with anticompetitive actions against WCT, eventually reaching an agreement by which the MIPTC and WCT consented to coexist. Under the agreement, MIPTC gave WCT certain designated sanctioning

and benefits in exchange for promises to restrict WCT's competition with MIPTC. Plaintiffs argue that this conduct has restricted the production of non-MIPTC-sanctioned events and has forced the majority of men's professional tennis events to apply to the MIPTC for sanctioning.

Plaintiffs next argue that the defendants exercise monopoly control over men's professional tennis players by way of contracts for their services. Players wishing to play in any MIPTC-sanctioned event must either sign a Commitment Agreement prescribed by MIPTC or, in some cases, play in a qualifying tournament. The Commitment Agreement requires any player ranked in the top one hundred men's singles players to participate in a minium number of Grand Prix events, which effectively controls the players' performances for twenty-one weeks a year. Further, players must agree not to participate in any event not sanctioned by MIPTC which occurs during certain specified MIPTC-sanctioned events. These restrictions effectively controlled players abilities to perform elsewhere for fourteen weeks in 1985 and for sixteen weeks in 1986. Additional clauses prohibit participation in non-MIPTC-sanctioned events held within certain distances and times from MIPTC-sanctioned events. Thus, by signing a Commitment Agreement, a player commits approximately thirty-six weeks a year to playing in only MIPTC-sanctioned events. Plaintiffs argue that because all of the top one hundred professional men's tennis players have signed MIPTC Commitment Agreements, and because these players are necessary for any successful men's tennis event, defendants exercise a complete monopoly over the services of men's professional tennis players. Plaintiffs also cite the bonus pool system as evidence of defendants' monopoly over players' services. Under that system, all MIPTC-sanctioned events must contribute

money to a bonus pool, from which prize money is awarded to players based on their cumulative performance in all MIPTC-sanctioned events. This prize money is awarded in addition to any prize money awarded for performance in individual sanctioned events.

Finally, plaintiffs allege that MIPTC has proposed four rules that have present anticompetitive impact and that, if enacted, would further restrain competition for production of men's professional tennis events. The four proposed rules are as follows:

1. The Special Event Rule would require that all parties affiliated with an MIPTC-sanctioned event not promote any non-sanctioned event during the forty-eight weeks a year occupied by sanctioned tournaments. Plaintiffs assert that this rule is currently deterring producers of both sanctioned and non-sanctioned events, including plaintiffs, from making contracts for those events that extend into the future, for fear that they will be broken in compliance with the rule. Plaintiffs also argue that because it is not economically feasible to run a profitable event during the remaining four weeks of the year, any party associated with a sanctioned event, including plaintiffs, is precluded from producing any non-sanctioned events.

2. The Best Interest Rule would give MIPTC the right to refuse to sanction any event whenever it decided that sanctioning the event would not serve the best interest of the sport of tennis. Plaintiffs assert that any party that now owns or produces a sanctioned event, or that believes it might in the future, is coerced to comply with all of defendants' demands or else risk the refusal or withdrawal of MIPTC's sanction under this rule.

3. The Conflicts of Interest Rule would require that any player-agent involved in producing an MIPTC-sanctioned event must obtain MIPTC approval before awarding any player a wild card position in the event. Wild card positions are those awarded to players without regard to his ranking, and are usually awarded independently by the owners and producers of an event. Plaintiffs claim that present and future owners and producers of sanctioned events are deterred by this rule from contracting with player-agents, for fear that its enactment will cost that event either its sanction or its control over the selection of wild card players.

4. Mandatory Pooling of Television Broadcast Rights would require any event seeking MIPTC-sanctioning to make MIPTC its representative and agent for negotiating the sale of television broadcast rights to any televised event. Plaintiffs claim that such pooling is an unreasonable restraint of and an attempt to monopolize the sale of rights to broadcast men's professional tennis events. They also assert that the proposed rule is presently deterring television companies from contracting with individual sanctioned and non-sanctioned events, for fear of competition with an MIPTC contract to broadcast a substantial package of sanctioned events.

*Claims Asserted Only by Volvo*

Volvo's breach of contract and fraud claims are based on its allegations that defendants breached the contracted bidding conditions for the 1985 Grand Prix sponsorship and the subsequent 1985 Agreement.

Volvo alleges that MIPTC agreed that no bid by any other sponsor applicant for the 1985 Grand Prix sponsorship would be accepted without allowing Volvo to match

the offer, unless it exceeded Volvo's bid by at least 20 percent. Volvo also alleges that on more than one occasion during 1983 and 1984, representatives of MIPTC and Volvo agreed that MIPTC would give good faith consideration to Volvo's offers and MIPTC would keep all Volvo's bids confidential. Volvo claims that it has documentary evidence that MIPTC did not give good faith consideration to its bid, and that MIPTC revealed Volvo's bid to Nabisco prior to the time that Nabisco submitted its bid. Volvo asserts, that based on this information, Nabisco increased its bid, but for which Volvo would have been awarded the 1985 Grand Prix sponsorship. Volvo claims that this conduct constitutes a breach of the contracted bidding terms. In addition, Volvo sues the defendants for fraud, claiming that MIPTC representatives knowingly made false statements that MIPTC would keep Volvo's bids confidential, and would give them good faith consideration, for the purpose of using Volvo's offers to increase offers by other bidders.

Under the 1985 Agreement, Volvo and MIPTC agreed to cooperate with each other's reasonable promotional activities. For a number of years before the 1985 Agreement, Volvo used a logo on all of its tennis-related promotional materials depicting the Volvo name and a tennis ball resting against the head of a tennis racket. Beginning in late 1984, Volvo expanded its tennis sponsorship to include men's professional and intercollegiate tennis and recreational tennis leagues. Volvo used the logo described above in conjunction with the phrase "Volvo Tennis" to promote these tennis sponsorships. Volvo claims that on March 13, 1985, defendant Happer sent letters to NBC Sports, Public Broadcasting Service ("PBS"), Entertainment and Sports Programming Network ("ESPN"), USA

Network, and to unnamed tennis tournament owners and producers accusing Volvo of misleading the public and encouraging the belief that it continued to be the overall Grand Prix sponsor, or that it maintained a circuit within the Grand Prix, by its continued use of the logo it had used while it was the overall sponsor. The letters stated that Volvo continued to use the term Volvo Tennis and continued its participation in tennis sponsorship to mislead the public and to injure Nabisco's Grand Prix sponsorship. The letters to the television networks requested that they not permit the use of the Volvo logo during their broadcasts of any Grand Prix events. The letters to the tournament owners and producers requested that they not permit any Volvo Tennis banners to be displayed at their events, and threatened the possible withdrawal of their MIPTC sanction if they did not comply with the request. Volvo claims that these letters constitute violations of the provision of the 1985 Agreement to cooperate with Volvo's reasonable promotional activities. Further, Volvo sues the defendants for fraud, claiming that MIPTC representatives knowingly made false statements that MIPTC would cooperate with such reasonable promotional activities in order to induce Volvo to relinquish its rights to the Madison Square Garden and NBC contracts.

Volvo also claims that defendants' statements to media representatives and other event owners and producers, that Volvo was guilty of unfair competition in its continued tennis sponsorship, was deliberately misleading the public, and was intended to injure Nabisco's Grand Prix sponsorship, constitute defamation. Finally, Volvo claims that these statements constitute product disparagement of its tennis sponsorship program.

## DISCUSSION

The defendants move to dismiss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For purposes of this motion, I "must accept the plaintiff[s'] well-pleaded allegations at face value, construe the allegations in the complaint in plaintiff[s'] favor, and dismiss the complaint only if 'it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] that would entitle [them] to relief.'" *Aeronca, Inc.* v. *Gorin,* 561 F. Supp. 370, 375 (S.D.N.Y. 1983) (citations omitted) (quoting *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957)) (footnote omitted). In order to withstand a motion to dismiss, the complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory." *Car Carriers, Inc.* v. *Ford Motor Co.,* 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied,* 470 U.S. 1054 (1985) (quoting *In re Plywood Antitrust Litig.,* 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed,* 462 U.S. 1125 (1983)). I will consider each of plaintiffs' causes of action *seriatim* under this standard.

Plaintiffs allege antitrust claims under sections one and two of the Sherman Act.

> [I]n the context of a 12(b)(6) challenge [to antitrust claims] the question is whether, if we accept all the allegations—including those relating to purpose and intent—as true, the plaintiffs have successfully pleaded a contract, combination, or conspiracy [to monopolize or] in restraint of trade within the meaning of the Sherman Act. The pleader may not evade these requirements by merely alleging a bare

> legal conclusion; if the facts "do not at least outline or adumbrate" a violation of the Sherman Act, the plaintiffs "will get nowhere merely by dressing them up in the language of antitrust." When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to providing antitrust litigation with an exemption from Rule 12(b)(6).

*Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d at 1106-07 (citations omitted) (quoting *Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984)).

1. *Plaintiffs' Claim Under 15 U.S.C. § 1*

In a civil action under section 1 of the Sherman Act, plaintiffs must establish two essential elements: (1) that defendants entered into a "contract, combination . . . , or conspiracy"; and (2) that that contract, combination, or conspiracy was "in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (1982 & Supp. III 1985); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 78 (2d Cir. 1980), *cert. denied,* 454 U.S. 1083 (1981). Forbidden restraints of trade "are defined generally as those activities where the anticompetitive effects outweigh the procompetitive effects." *Robinson* v. *Magovern,* 521 F. Supp. 842, 904 (W.D.Pa. 1981), *aff'd without opinion,* 688 F.2d 824 (3d Cir.), *cert. denied,* 459 U.S. 971 (1982). Certain business combinations are defined as *per se* unreasonable

and illegal under section 1, without further inquiry. These include "price fixing, division of markets, group boycotts, and tying arrangements." *Id.* (citations omitted) (quoting *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958)).

Plaintiffs allege that defendants' conduct constitutes a group boycott, and is therefore a *per se* violation of section 1 of the Sherman Act. Neither a group boycott nor any facts to support such a *per se* violation are alleged in the complaint. In fact, a group boycott is not even mentioned in the factual allegations of the complaint, and is only briefly mentioned in the final listing of each count at the end of the seventy-three page document. While plaintiffs have not stated a cause of action for a *per se* violation of section 1, I must next consider whether plaintiffs have established some contract or combination which is an unreasonable restraint of trade, where the anticompetitive effects outweigh the competitive effects. I have already discussed why no cause of action for conspiracy is made out in the complaint. Plaintiffs assert that the WCT-MIPTC agreement, the player Commitment Agreements, and the four proposed MIPTC rules constitute unreasonable restraints of the men's professional tennis market. I find that the facts set forth in the complaint do not make out such a claim.

Assuming that WCT did produce a series of men's tennis events independent of and competitive with those sanctioned by MIPTC, the fact that WCT contracted with MIPTC does not constitute an unreasonable restraint of trade in and of itself. That the WCT created a tennis event series competitive with MIPTC suggests that other parties could do the same. In addition, the fact that MIPTC made an offer sufficiently beneficial to WCT to convince it to apply for

MIPTC sanctioning in no way precludes any other party from creating an independent, competitive tennis event series. Plaintiffs conclude that this agreement has forced the majority of men's professional tennis events to apply for MIPTC sanctioning, and that this constitutes a section 1 violation. The facts simply do not bear this out. Neither the fact that the financial costs of creating a competitive tennis event series are high, nor that such a series has not been created since the WCT-MIPTC agreement constitute an antitrust violation.

Plaintiffs next cite the player Commitment Agreements and bonus pool system as section 1 violations. The player Commitment Agreements are essentially employment contracts that require employee players to play only for MIPTC for thirty-six weeks a year. Employers may impose reasonable employment conditions for a reasonable period of time. Even accepting plaintiffs' assertion that creating an independent tennis event series is not feasible during the remaining weeks of the year, I cannot find that an exclusive employment contract for thirty-six weeks a year is imposed for an unreasonable length of time. The fact that MIPTC contracts for exclusive use of players' personal services does not constitute an illegal restraint of trade in those services. Similar contracts have been upheld in other situations involving athletic performances. *Madison Square Garden, Inc.* v. *Shavers,* 434 F. Supp. 449, 450 (S.D.N.Y. 1977) (non-competition clause in athlete's contract to participate in a championship boxing match upheld). Plaintiffs are free to contract with the top-ranked men's tennis players for their services after their current MIPTC contracts expire. Plaintiffs complain that they will have to pay more for those players' services. First Amended Complaint, at ¶ 54. In other words, plaintiffs must compete with MIPTC

for the services of those top-ranked players. The fact that MIPTC's existence makes that competition more expensive for plaintiffs is insufficient to establish a section 1 violation.

The bonus pool system is simply a condition of the MIPTC sanctioning arrangement, and a benefit offered to induce tennis players to sign Commitment Agreements. It in no way prevents plaintiffs from obtaining contracts with those players by making them a better offer.

Finally, plaintiffs assert that the four proposed MIPTC rules constitute section 1 violations. Plaintiffs complain that the Special Events Rule would effectively prohibit any participant in a MIPTC-sanctioned event from producing any non-sanctioned event. If enacted, the Special Events Rule would be essentially a condition of the MIPTC sanctioning arrangement. Assuming that the rule prevents parties from producing both sanctioned and non-sanctioned events, it in no way bars a competitor from creating a competitive tennis event or series of events independent of MIPTC sanctioning.

Plaintiffs assert that the Best Interest Rule unfairly coerces any party wishing to participate in an MIPTC-sanctioned event to comply with all of MIPTC's demands. If enacted, the Best Interest Rule would also be a condition of the MIPTC sanctioning arrangement. While the rule might determine to whom MIPTC agrees to grant sanctioning, like the Special Events Rule it has no bearing on whether or not a competitor can create an independent tennis event or series of events.

Plaintiffs argue that the Conflicts of Interest Rule is deterring present and future events owners and producers from contracting with player-agents, and that this constitutes a section 1 violation. Rather, the rule, if enacted, would be a condition of the MIPTC sanctioning arrangement that

addresses a very specific situation. When the owner or producer of a sanctioned event is also a player-agent, a potential conflict of interest exists regarding the award of wild card positions to players; the obvious temptation is that the owner or producer will award wild card positions to players he represents in his role as player-agent. When that situation arises in the context of an MIPTC-sanctioned event, the rule would grant MIPTC final approval of the wild card players. Such a contractual condition of the sanctioning arrangement is unrelated to a competitor's ability to create an independent tennis event or series of events, and therefore does not constitute an antitrust violation under section 1.

Finally, plaintiffs protest that the proposed rule requiring mandatory pooling of television broadcast rights would constitute an unreasonable restraint in the sale of rights to boardcast men's professional tennis events. Once again, this rule, if enacted, constitutes a condition internal to the MIPTC-sanctioning arrangement and unrelated to a competitor's ability to create an independent tennis event or series of events and to negotiate the sale of rights to broadcast those events.

2. *Plaintiffs' Claim Under 15 U.S.C. § 2*

Plaintiffs next assert that the WCT-MIPTC agreement, the player Commitment Agreements, and the four proposed MIPTC rules constitute a willful acquisition and maintenance of monopoly power over men's professional tennis in violation of section 2 of the Sherman Act. "The offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or

development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The relationships between and development of the MIPTC, WCT, and ITF are described in the First Amended Complaint, and are a consequence of the recent historical development of the sport of men's professional tennis. Furthermore, MIPTC does not possess an illegal monopoly power in the men's professional tennis market. Nothing other than perhaps economics bars any of the plaintiffs from entering the market for men's professional tennis events. However, plaintiffs are unwilling to compete in that market. Because they are unwilling to expend the funds necessary to enter the market, plaintiffs claim that MIPTC has a monopoly power, which assertion is not borne out by the facts alleged in the Complaint.

Courts have recognized that the ability to restrict the supply of talented athletes may in some instances constitute anticompetitive behavior. In *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 508 (E.D. Pa. 1972), the court held that the interlocking agreements developed by the National Hockey League ("NHL") to control hockey players' careers were unreasonable, and constituted a violation of section 2 of the Sherman Act. In that case, the Standard Players' Contract reserve clause constituted a perpetual option granting the NHL virtual control over a player's entire career, if it decided to exercise that option. *Id.* at 509. The facts presently at issue involve control over a player's services for independent periods of thirty-six weeks, and are so different from the NHL perpetual option as to make the *Philadelphia* case clearly inapplicable to the present facts.

*Opinion of the District Court—August 10, 1987*

3. *Plaintiffs' Claim of Tortious Interference with Prospective Business Relationships*

Plaintiffs allege that MIPTC's conduct constitutes tortious interference with prospective business relationships. In order to make out such a *prima facie* claim, plaintiffs must allege the following elements:

(1) business relations existing between plaintiffs and a third party;

(2) defendants' interference wtih those business relations;

(3) either defendants' sole intent to harm plaintiffs by that interference, or defendants' use of means that are dishonest, unfair, or improper; and

(4) the harmul impact of defendants' behavior on plaintiffs' identifying the contract that would have been entered into but for defendants' interference.

*Martin Ice Cream Co.* v. *Chipwich, Inc.*, 554 F. Supp. 933, 945 (S.D.N.Y. 1983); *El Greco Leather Prods. Co.* v. *Shoe World, Inc.*, 623 F. Supp. 1038, 1044 (E.D.N.Y. 1985), *rev'd in part on other grounds,* 806 F.2d 392 (2d Cir. 1986). Plaintiffs here make a conclusory allegation, but present no factual allegations to support it. Plaintiffs do not allege business relations existing between them and a third party that were harmed by defendants' behavior. Neither do plaintiffs allege the contract or contract negotiations to establish a competitive tennis events series that would have been consummated but for defendants' behavior. Moreover, plaintiffs fail to make sufficient allegations that defendants' conduct was intended solely to harm them or was in any way improper. Therefore, plaintiffs' cause of

action for interference with prospective business relationships cannot stand.

4. *Plaintiffs' Claim of Unfair Competition*

Plaintiffs allege that defendants' conduct constitutes common law unfair competition. The tort of unfair competition is "generally described as a misappropriation of the skill, expenditures, and labor of another. 'One cannot sell his product by misappropriating the good will of another through misleading the public into thinking that it is "sponsored" by or derived from something else.' " *American Footwear Corp.* v. *General Footwear Co., Ltd.*, 609 F.2d 655, 662 (2d Cir. 1979), *cert. denied,* 445 U.S. 951 (1980) (citations omitted) (quoting *Ideal Toy Corp.* v. *Kenner Prods. Div. of General Mills Fun Group, Inc.*, 443 F. Supp. 291, 305 (S.D.N.Y. 1977). An element of bad faith is essential to this notion. *Saratoga Vichy Spring Co.* v. *Lehman,* 625 F.2d 1037, 1044 (2d Cir. 1980). In order to make out a cause of action for unfair competition, a complaint must set forth: "(1) the acts or omissions by defendants that proximately caused the misappropriation and (2) the property or benefit misappropriated—mere allegations that [plaintiffs have been harmed] will not suffice." *Bunch* v. *Artec Int'l Corp.*, 559 F. Supp. 961, 972 (S.D.N.Y. 1983). It is unclear to me how the WCT-MIPTC Agreement, the player Commitment Agreements, and the four proposed MIPTC rules could constitute common law unfair competition. Plaintiffs fail to allege any act of misappropriation or omission by defendants, and nowhere identify what skill, expenditures, labor, property, or benefit defendants have misappropriated from them. Therefore, the First Amended Complaint fails to state a cause of action for unfair competition.

5. *Volvo's Breach of Contract Claims*

Volvo presents sufficient allegations to support its claims for breach of contract against a motion to dismiss. Volvo alleges that defendants breached the contracted bidding conditions for the 1985 Grand Prix sponsorship and the provision of the 1985 Agreement between MIPTC and Volvo to cooperate with each other's reasonable promotional activities. While it appears that complete diversity between the parties exists to support federal diversity jurisdiction over these claims, Volvo neither pleads that "the matter in controversy exceeds the sum or value of $10,000", as required by 28 U.S.C. § 1332(a) (1982), nor pleads any specific amount of damages suffered. Therefore these claims are dismissed with leave to replead.

6. *Volvo's Claim of Fraud*

Defendants move to dismiss Volvo's fraud claim for failure to plead the circumstances constituting fraud with particularity, as required by Fed. R. Civ. P. 9(b). That rule requires that Volvo must allege not only the elements of a fraud claim, but also state "the time, place and manner in which the allegedly false representations were made, [and] the identity of the person[(s)] making the alleged misrepresentation[(s)]. This pleading is [required in order] to inform defendant[(s)] of the claim against [them] and the acts relied upon as constituting the fraud charge." *Fraser* v. *Doubleday & Co.,* 587 F. Supp. 1284, 1289 (S.D.N.Y. 1984) (citations omitted). "A contractual promise made wtih the undisclosed intention not to perform it constitutes fraud." *Perma Research and Dev. Co.* v. *Singer Co.,* 410 F.2d 572, 575 (2d Cir. 1969) (quoting *Sabo* v. *Delman,* 3 N.Y.2d 155, 162, 164 N.Y.S.2d 714,

718, 143 N.E.2d 906, 909 (1957)). "The essential elements of such a claim are (1) representation of a material existing fact; (2) falsity of the statement; (3) scienter; (4) deception; and (5) injury." *Songbird Jet Ltd., Inc.* v. *Amax Inc.*, 581 F. Supp. 912, 925 (S.D.N.Y. 1984). Volvo alleges that defendants knowingly made false statements that they would keep Volvo's bid for the 1985 Grand Prix sponsorship confidential, that they would give Volvo's sponsorship bid good faith consideration, and that they would promote Volvo's reasonable promotional activities in exchange for Volvo's rights under its contracts with Madison Square Garden and NBC. Volvo also alleges its reliance on these false statements and its resultant harm. Assuming that these allegations make out the essential elements of a fraud cause of action, the complaint fails to set forth the specific false representations alleged; and when, where, how, and by whom they were made. Therefore, Volvo's fraud claim must be dismissed for failure to comply with the requirements of Fed. R. Civ. P. 9(b). Leave to replead these claims, however, is granted.

7. *Volvo's Claim for Defamation*

Volvo asserts that defendants' statements to media representatives and other event owners and producers constitute defamation. Volvo alleges that defendants made the following defamatory statements: (1) Volvo was guilty of unfair competition in its continued tennis sponsorship; (2) Volvo was deliberately misleading the public into beleving that it continued to be the overall Grand Prix sponsor; and (3) Volvo's continued tennis sponsorship was intended to injure Nabisco's Grand Prix sponsorship. In order to state a *prima facie* cause of action for defamation,

Volvo must plead that defendants "(1) negligently or willfully uttered a (2) defamatory statement (3) of or concerning the plaintiff (4) to a third person (5) which resulted in damage to plaintiff's reputation." *Carto* v. *Buckley,* 649 F. Supp. 502, 505 n.1 (S.D.N.Y. 1986). In defamation actions, "the false and defamatory matter should be pleaded *in haec verba.*" *Foltz* v. *Moore McCormack Lines,* 189 F.2d 537, 539 (2d Cir. 1951); *Herbert* v. *Lando,* 603 F. Supp. 983, 990 (S.D.N.Y. 1985). In *Foltz,* the plaintiff paraphrased the allegedly false statements in the pleadings, as did Volvo here, which the court held was insufficient to state a cause of action for defamation. *Foltz* v. *Moore McCormack Lines,* 189 F.2d at 539. Assuming that Volvo sufficiently stated a cause of action for defamation, the allegedly defamatory statements are not set forth in any of Volvo's papers. Therefore the defamation claim must be dismissed. Again, leave to replead these claims is granted.

8. *Volvo's Claim for Product Disparagement*

Volvo claims that the same statements that constitute defamation also constitute product disparagement of its tennis sponsorship program. In order to state a *prima facie* cause of action for product disparagement, Volvo must plead: (1) that defendants made the allegedly disparaging statements with "knowledge of the alleged false statement or reckless disregard as to the truth of the statement", *Charles Atlas, Ltd.* v. *Time-Life Books, Inc.,* 570 F. Supp. 150, 154 (S.D.N.Y. 1983); and (2) special damages. "Special damage is the pecuniary loss resulting directly from the effect of [defendants'] allegedly wrongful conduct," *id.* at 155, including all the expenses necessary to counteract the allegedly wrongful conduct and loss of sales.

While Volvo alleges that defendants made the allegedly disparaging statements with malice, it has made no allegations that it has suffered special damages as a result of those statements. Therefore, Volvo's claim for product disparagement must be dismissed.

In sum, counts one through seven and thirteen of plaintiffs' complaint are dismissed. Counts eight through twelve are dismissed with leave to replead. Because plaintiffs' antitrust claims are dismissed, I need not consider defendants' motion to dismiss portions of the complaint as not ripe for adjudication.

So Ordered.

Dated: New York, New York
August , 1987

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Kevin Thomas Duffy, U.S.D.J.

(3)

No. 87-1823

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,

*Petitioners,*

—against—

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION AND PROSERV, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTION PRESENTED

In allowing Respondents to appeal pursuant to 28 U.S.C. § 1292(a)(1) from an Order of the District Court for the Southern District of New York which effectively denied the Respondents an injunction on the merits, was the Second Circuit correct where it found that Respondents would suffer serious, perhaps irreparable consequence if denied the right to pursue an immediate appeal?

## RULE 28.1 STATEMENT

The parent of Respondent Volvo North America Corporation is AB Volvo, a Swedish corporation, shares of which are traded in the form of American Depository Receipts on the NASDAQ over-the-counter exchange in New York. Volvo North America Corporation owns 76% of Volvo GM Heavy Truck Corporation, 24% of which is owned by General Motors Corporation. AB Volvo is the 100% shareholder of a Swedish subsidiary, Volvo BM, which owns 50% of a joint venture, VME Group N.V., of which the remaining 50% is owned by Clark Equipment Co.

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IN THE

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## BRIEF IN OPPOSITION

### COUNTERSTATEMENT OF THE CASE

Respondent Volvo North America Corporation ("Volvo") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit by Men's International Professional Tennis Council ("MIPTC"), M. Marshall Happer, III and Philippe Chatrier (collectively "Petitioners").

In effect, Petitioners ask the Court to deem Section 1292(a)(1) amended to be limited to preliminary injunctions. Congress has not chosen to so limit the statute and there is no support in the prior decisions of the Court for such a narrow construction of the statute.

**Proceedings Below**

In April 1985, Respondent Volvo filed a summons and complaint against Petitioners MIPTC, M. Marshall Happer, III and Philippe Chatrier, the Administrator and then-Chairman of the MIPTC, respectively, alleging various federal antitrust and common law claims arising out of Petitioners' efforts to monopolize and restrain competition in the market for men's professional tennis.

On May 8, 1985, Petitioners moved to dismiss the Complaint. On or about July 3, 1985, prior to submission of that motion, Respondent Volvo served a First Amended Complaint (hereinafter "Complaint") (J.A. 7)[1], which made no substantive changes in its allegations concerning Volvo, and requested Petitioners' consent to the addition of Respondents International Merchandising Corporation ("IMC") and ProServ, Inc. ("ProServ") as additional plaintiffs. Petitioners agreed on the condition that all discovery be suspended pending a motion to dismiss the new Complaint. Respondents refused this condition. On September 11, 1985, the district court granted Respondents' motion to add plaintiffs and declined to restrict discovery.

The first five counts of the Complaint allege a group boycott, a combination and conspiracy to restrain trade, monopolization, attempt to monopolize and a conspiracy to monopolize, respectively, under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The sixth and seventh counts allege common law claims for interference with prospective business relationships and unfair competition.[2]

On September 13, 1985, Petitioners moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1), on the ground that some of the antitrust claims were not ripe for adjudication,

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1 All references to "J.A." are to pages of the Joint Appendix filed in the Second Circuit.

2 Counts 8 through 13 of the Complaint are common law claims asserted by Volvo alone and are not the subject of the Appeal.

and Fed. R. Civ. P. 12(b)(6), on the ground that Respondents lacked standing to assert antitrust claims. Petitioners' motion was submitted to the district court on January 14, 1986.

On or about August 10, 1987, the district court dismissed the entire Complaint. *Volvo North America Corp.* v. *Men's International Professional Tennis Council*, 678 F. Supp. 1035 (S.D.N.Y. 1987). The district court addressed none of the issues briefed by the parties below but rather relied upon grounds neither briefed nor argued by any of the parties with respect to the federal claims. Its decision was thus an improper *sua sponte* determination. The district court also applied an incorrect standard for testing the sufficiency of the allegations by referring to Respondents' failure to establish or to demonstrate facts, citing authority more appropriate to a motion for summary judgment or a post-trial review. Finally, although the Complaint was the first pleading of ProServ and IMC and no substantive changes had been made in the pleading with respect to Volvo, the district court denied leave to amend with respect to the federal antitrust and certain other claims without stating any reason for the denial.[3]

Respondents Volvo and ProServ filed notices of appeal on September 8, 1987 and Respondent IMC filed its notice of appeal on September 9, 1987.[4] On September 29, 1987, a staff attorney for the Second Circuit suggested that Respondents apply to the district court for the entry of a judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure in order to avoid litigating the issue of appealability. On the same day, the district court refused Respondents' request to appear and discuss such an application. Respondents were informed that the district court would not grant a motion pursuant to Rule 54(b)

3 The district court also dismissed the other common law claims (Counts 8 through 12) asserted by Volvo only, but granted Volvo leave to replead those claims.

4 Volvo does not "claim[ ] that it had not abandoned its right to seek to replead certain of its state law claims." (Petition at 5). The district court approved Volvo's request that it be allowed to replead those claims thirty days following disposition of Respondents' appeal to the Second Circuit.

even though the motion had not been formally presented or argued (Declaration of Robert S. Litt, executed on October 14, 1987).

On October 8, 1987, Petitioners moved to dismiss Respondents' appeal, arguing that the court below had no jurisdiction to entertain the appeal pursuant to 28 U.S.C. § 1292(a)(1). After full briefing, the submission of affidavits from both Petitioners and Respondents and oral argument, the Second Circuit entered an order on February 8, 1988 denying Petitioners' motion to dismiss the appeals. On the record before it, the Second Circuit found that the dismissal of Respondents' claims on the merits, and the additional irreparable harm threatened by Petitioners pending final judgment, satisfied the test for interlocutory appealability pursuant to Section 1292(a)(1). *Volvo North America Corp.* v. *Men's International Professional Tennis Council*, 839 F.2d 69 (2d Cir. 1988) ("*Volvo* v. *MIPTC*") (a copy of which is attached to the Petition as A1-18).

Subsequently, Petitioners made two additional motions to the Second Circuit. The first, filed February 29, 1988, sought an order holding the appeal in abeyance pending the filing of the instant Petition. On April 11, 1988, Petitioners served with their brief on the merits a motion which sought an order striking various portions of Respondents' briefs as improperly including material not appearing in the record. Petitioners' motions were denied without opinion on March 16 and April 22, 1988, respectively.

Petitioners served and docketed the instant Petition on May 6. The appeal was argued in the Second Circuit on May 9.[5]

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5 On November 6, 1985, Petitioners also answered and counterclaimed against Respondents and others, asserting antitrust and other claims. Respondents' motions to dismiss Petitioners' counterclaims were submitted to the district court on June 3, 1986. On May 18, 1988, the district court issued an opinion and order dismissing Petitioners' claims, with leave to replead certain of the common law claims.

**The Injunctive Effect of Respondents' Action**

Volvo is a corporation organized under the laws of the State of Delaware, with its principal place of business in New Jersey. Since 1973, Volvo has been increasingly active in the ownership, production and sponsoring of men's professional tennis events. Volvo conducts these activities, in part, in cooperation with Respondent ProServ which, like Respondent IMC, is a sports management company (J.A. 7-8). Volvo and its affiliates spend almost $3 million annually in its tennis activities.

Petitioner MIPTC is a governing council of representatives from various organizations which produce or participate in tennis events. Respondents alleged, based upon the MIPTC's own Constitution and By-Laws, that the MIPTC is an unincorporated association consisting of nine members. Three of the representatives are elected by the International Tennis Federation ("ITF"), an association of more than 110 national tennis associations including those which own and produce the four Grand Slam events and which organize the Davis Cup events. Three representatives are elected by the owners of all other Grand Prix tournaments; that is, events holding a sanction from the MIPTC. The remaining three representatives are elected by men's professional tennis players (J.A. 9-10). Petitioner MIPTC claims that it is an association of more than 400 members including all of the tournament owners, all of the national tennis associations and all men's professional tennis players. Defendants' Counterclaims and Answer, ¶ 6.

In the Complaint, Respondents alleged that the MIPTC and certain co-conspirators conspired to monopolize and to restrain trade in the markets for the services of men's professional tennis players and the production of men's professional tennis events. The MIPTC schedules and sanctions events, including Wimbledon, the U.S. Open, the French Open and the Australian Open—the Grand Slam events. Generally, the Complaint alleges that the MIPTC's control over the Grand Slam events gives it control over virtually all top men's tennis players; without signing Commitment Agreements, which obligate them to play in various designated sanctioned events, the top players are

effectively barred from participation in the most prestigious events, the Grand Slam events. The Commitment Agreements, in turn, give the MIPTC the power to control the production of professional tennis events. Through the agreements, the players agree not to participate in certain non-sanctioned events, or Special Events. Thus, to ensure the attraction of the top players, and so the success of its tournament, a tournament producer must obtain a sanction from the MIPTC (J.A. 24-26, 31-36).

In or about September 1979, Volvo substantially increased its participation in the sport by agreeing to become the overall sponsor of the entire series of Grant Prix tournaments organized and scheduled by the MIPTC (J.A. 40). In 1984, Volvo was told that its bid for continued sponsorship of the Grand Prix had been defeated by Nabisco Brands. In 1985, however, Volvo learned of documentary evidence which indicates that the MIPTC leaked information concerning Volvo's confidential bid which resulted in a last-minute increase in Nabisco's offer but for which Volvo believes it would have been awarded the new contract for the overall sponsorship of the Grand Prix (J.A. 42).

Following the loss of the overall sponsorship, Volvo began using the phrase "Volvo Tennis" in conjunction with a picture of a tennis racket and a ball, which it had previously used in its sponsorship activities. On or about March 13, 1985, Petitioner Happer, administrator of the MIPTC, sent letters to NBC Sports, Public Broadcasting Service, ESPN, and USA Network and to various tournament owners and producers. These letters accused Volvo of deliberately and intentionally misleading the public into believing that Volvo continued as the overall Grand Prix sponsor. Happer requested that the television networks not permit the use of that logo by Volvo during their telecasts of any Grand Prix events. Happer sought to dissuade and intimidate the tournaments from associating with Volvo by threatening to withdraw the sanction of any tournament displaying a Volvo Tennis banner (J.A. 44-48).

In addition, Volvo believed that the MIPTC was about to adopt certain rules at its April 1985 meeting which would severely impair Respondents' ability to compete in the market for the production of tennis tournaments (J.A. 48-55). Faced with these continuing abuses of the MIPTC's monopoly power and attempts to further restrain any competition in men's professional tennis, Volvo commenced this action, alleging violations of the federal antitrust laws and seeking broad injunctive relief to stop the MIPTC's predatory conduct.

Volvo's commencement of the legal action stopped the MIPTC in its tracks. The MIPTC abandoned its plans to adopt the new rules and its vitriolic attacks on Volvo and its interference with Volvo's use of its Volvo Tennis logo ceased. Peace, however, was short-lived (C. 9-10)[6].

Pursuant to a January 1985 agreement between Volvo and the MIPTC, the MIPTC agreed to sanction the Volvo Tennis/Chicago tournament to be produced by Volvo for three years, 1985 through 1987 (J.A. 106-08). In April 1986, the MIPTC scheduled the Volvo Tennis/Chicago event in 1987, so that it would compete with a Special Tokyo Event produced by ProServ and bring into play all of the restrictive rules which would require the top 100 players who had signed Commitment Agreements to forego that Special Event. Subsequently, in June 1986, ProServ and Volvo learned that major league baseball might change its opening day schedule which would require NBC to televise nationally baseball rather than the final match of the Volvo Tennis/Chicago tournament on April 5, 1987. The MIPTC refused to reschedule the tournament by one week to avoid the possible conflict with baseball (J.A. 108-13, 125).

Volvo filed an Order to Show Cause seeking a temporary restraining order and noticing a motion for a preliminary injunction. At a hearing held on September 24, 1986, the district court denied Volvo's application for a temporary restraining order and indicated that a motion for a preliminary injunction would also be denied. The court reasoned that Volvo would not be

6 All references to "C." are to pages of the Compilation of Selected Materials Filed with the Second Circuit.

prevented from obtaining television coverage for Volvo Tennis/ Chicago on a local Chicago station, and that, even if the tournament were to be rescheduled, NBC could decide to breach that contract and "put on Sumo wrestling instead of tennis" (J.A. 141-42). While considering whether to appeal the district court's denial of its application, Volvo learned that major league baseball had decided not to change its schedule, and the issue became moot.

Apparently heartened by the attitude demonstrated at the September 24 hearing by the district court, in February 1987 the MIPTC proceeded to adopt a new rule which will require Volvo's co-Respondents to choose between producing MIPTC-sanctioned Grand Prix tournaments exclusively or acting exclusively as agents for men's professional tennis players.[1] This rule is effective with respect to tournaments commencing in January 1989 and thus did not present an issue of imminent irreparable harm prior to the August 10, 1987 decision (C. 10).

Finally, in 1987, the MIPTC advised Volvo that it would not renew the sanction for the Volvo Tennis/Chicago tournament, claiming that that sanction had been awarded only pursuant to the agreement of January 1985, which had expired (C. 10). Various attempts by Volvo and ProServ were made to convince the MIPTC that its decision was contrary to any rational economic analysis. Volvo Tennis/Chicago was one of the most successful tournaments in the entire Grand Prix, one of the few tournaments to receive major network television coverage and was held in one of the largest United States metropolitan areas. Volvo's efforts to reverse this decision were continuing when the district court announced its decision dated August 10, 1987 dismissing all of Volvo's antitrust claims without leave to amend.

Since the dismissal, Respondent ProServ has been advised that its Grand Prix tournament in Orlando will not receive a

1 In April 1985, the MIPTC was proposing, and apparently is still considering, a Special Events rule which would prohibit owners, agents, consultants and associates of sanctioned Grand Prix tournaments from promoting any Special Event.

MIPTC sanction for 1989. Moreover, the MIPTC has indicated that it will not approve a sanction for a buyer of that event. The MIPTC has also threatened the sanction of any other event having a relationship with the management companies, including the Boston Grand Prix event unless IMC's ownership interest and management of that event is terminated.

The district court's dismissal of Respondents' Complaint, just at a time when Petitioners were renewing their campaign of monopolistic and anticompetitive conduct directed at Respondents in particular, left Respondents with no legal basis upon which they could seek any injunctive relief against Petitioners. Without such relief, Respondents will have no protection against the continuing illegal conduct described in this brief or similar future illegal conduct.

## SUMMARY OF ARGUMENT

1. Pursuant to Rule 18 of the Rules of the Court and general principles of judicial economy, the Petition should be denied because it is premature. No final judgment on the merits has been entered in the Court of Appeals for the Second Circuit, and this case is not one of "such imperative public importance" as to justify immediate review by the Court.

2. Pursuant to Rule 17.1(a) of the Rules of the Court, the Petition should be denied because the decision below does not conflict with the decision of any other Circuit Court of Appeals.

3. The Petition should be denied for the further reason that the Court of Appeals for the Second Circuit based its decision on factual matters peculiar to the litigants herein.

## ARGUMENT

### I

### THE PETITION SHOULD BE DENIED AS PREMATURE

Rule 18 of the Rules of the Court militates against a grant of this Petition for a Writ of Certiorari. This is not a case of "such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18 (citing, *inter alia*, *United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952)). Petitioners make no such claim here.

Since the merits of the appeal are currently *sub judice* in the Court of Appeals for the Second Circuit, traditional principles of judicial economy support a denial of the Petition in this case. *McLish* v. *Roff*, 141 U.S. 661, 665 (1891) ("[The] policy of the acts of Congress in relation to appeals and writs of error, . . . ha[s] been to save the expense and delays of repeated appeals in the same suit . . ."). Were the Court to grant the Petition, any opinion on the merits issued in the interim by the Second Circuit in Respondents' favor might become moot and might render that court's efforts wasted. Similarly, an interim decision by the Second Circuit on the merits in Petitioners' favor would provide them with essentially the relief they seek in the Court, obviating the need for the Court's review.

Moreover, Petitioners have demonstrated no urgency herein which would arguably favor review by the Court prior to a final decision on the merits. Petitioners will suffer no harm in awaiting disposition by the Second Circuit of Respondents' appeal. Indeed, Petitioners' own arguments before the Second Circuit in support of their motion to hold the appeal in abeyance pending the filing of their Petition concede the inefficiencies stemming from their interlocutory Petition. There, Petitioners argued forcefully that an interim decision by that court on the merits would frustrate the principle of judicial economy. Brief of Appellees MIPTC, Happer and Chatrier in Support of Mo-

tion to Hold Appeals in Abeyance, dated February 29, 1988, at 3. Thus, the Petition should be denied as premature.

## II

## THE PETITION SHOULD BE DENIED BECAUSE THE DECISION IN THIS CASE IS NOT IN CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL

Petitioners' characterization of the question presented by its Petition misconstrues the holding of the court below. Contrary to Petitioners' reading of the Second Circuit's opinion, that court merely applied the Court's holding in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981) ("*Carson*"), to the facts before it. Thus, Petitioners' attempt to fashion a conflict among the circuits must fail; the Second Circuit's opinion is entirely consistent with those opinions from Circuits with which Petitioners contend the Second Circuit is in conflict.

*Carson* governs the appealability of interlocutory orders which have the practical effect of denying injunctive relief. *Accord Volvo* v. *MIPTC*, 839 F.2d at 73 (Petition at A11); *see* Petition at 7. *Carson* ruled that an interlocutory order having the practical effect of refusing an injunction may be appealed pursuant to Section 1292(a)(1) only where there is a showing of "serious, perhaps irreparable consequence," and the order can be "effectually challenged" only by immediate appeal. *Carson*, 450 U.S. at 78; *Volvo* v. *MIPTC*, 839 F.2d at 73 (Petition at A9).

Harmonizing the Court's earlier decision in *General Electric* v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932) ("*General Electric*"), the *Carson* Court noted that a disposition on the merits of a counterclaim for injunctive relief satisfied the requisite showing of serious, perhaps irreparable consequence, deeming the dismissal to be similar in effect to the denial of preliminary injunctive relief. "[T]his decision 'resolved the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction.' " *Carson*, 450 U.S. at 86 n.11 (quoting *General Electric*, 287 U.S. at 430).

The Second Circuit, following *Carson*'s reading of *General Electric*, ruled that the instant appeal from a dismissal on the merits of Respondents' claims for injunctive relief satisfied the *Carson* test for interlocutory appealability. The Second Circuit held that where the practical effect of a dismissal of a claim is to deny an application for injunctive relief, appellant must succeed in "establishing that the dismissal from which they appeal is a 'serious, perhaps, irreparable consequence' and can be 'effectually challenged' only by immediate appeal." *Volvo* v. *MIPTC*, 839 F.2d at 73 (Petition at A11) (quoting *Carson*, 450 U.S. at 78). Like the appellants in *General Electric*, the Second Circuit found that Respondents would suffer serious, perhaps irreparable consequence without immediate review in part because their right to injunctive relief has been finally adjudicated. *Volvo* v. *MIPTC*, 839 F.2d at 75-76 (Petition at A14-16).

An action for permanent injunctive relief, as here, involves continuing illegal activities which at any time during the pendency of the action may give rise to a need to apply to the district court for preliminary injunctive relief. One very practical reason for allowing immediate appeals from orders dismissing claims for permanent injunctive relief on their merits is that the plaintiffs would be deprived of the opportunity to seek expeditious preliminary relief if resort to an appellate court for relief from the erroneous decision of a single district court judge were blocked indefinitely. An application for preliminary relief cannot be made unless the harm threatened is imminent; a plaintiff cannot obtain expeditious protection from imminent irreparable harm if it has no underlying claim upon which to base its application for interim relief. *Cf. Carson*, 450 U.S. at 85 and n. 10.

That the Second Circuit has followed *Carson* is made clear by the more recent Second Circuit opinion in *Chasser* v. *Achille Lauro Lines*, Nos. 87-9081, 87-9083, 87-9085, 87-9087, 87-9089, 87-9091, slip op. (2d Cir. April 7, 1988). In *Chasser*, the Second Circuit, by a panel including Circuit Judge Mahoney, the author of the *Volvo* opinion, stated unequivocally:

> [E]ven if such a denial [of a motion to dismiss on the basis of forum selection clauses] were tantamount to the denial of injunctive relief, we would grant the present motion to dismiss [the appeal], for the Supreme Court "has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a " 'serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" *only* by immediate appeal.' " *Stringfellow*, 107 S.Ct. at 1184 (quoting *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955))) (emphasis ours).

*Chasser* v. *Achille Lauro Lines*, slip op. at 2539.[8]

Petitioners contend that the Second Circuit erred in interpreting *Carson* to permit the appeal despite Respondents' failure to move for preliminary injunctive relief below, and it is this error which Petitioners contend creates the conflict among the circuits (Petition at 14).[9] Yet nothing in *Carson* makes an applica-

8 In an effort to point to a conflict in the Circuits, Petitioners contend that the Second Circuit has taken sides with the approach adopted by the District of Columbia Circuit, citing that court's opinion in *Center for Nat'l Sec. Studies* v. *CIA*, 711 F.2d 409 (D.C. Cir. 1983). As illustrated above, the Second Circuit has simply adopted the test enunciated in *Carson*. Moreover, Petitioners mistate the holding of the District of Columbia Circuit in *Center for Nat'l Sec. Studies* (Petition at 8 n.6). The statements made there concerning the appealability of orders which have dismissed claims on the merits are mere *dicta*; the court ultimately applied *Carson*'s irreparable consequence assessment to the facts at bar and held the order non-appealable under Section 1292(a)(1). *Center for Nat'l Sec. Studies*, 711 F.2d 409, 414 ("Since [appellant] has failed to show serious, perhaps irreparable, harm resulting from denial of review we lack jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district judge's grant of summary judgment to CIA on count VII.").

9 As discussed *supra*, Petitioners misstate the record in this respect. Volvo did apply for a temporary restraining order in the district court and was summarily and perfunctorally denied an Order to Show Cause

tion for preliminary injunctive relief a prerequisite to satisfying the serious, perhaps irreparable consequence criterion.

Indeed, no such prerequisite is required by the First, Third or Federal Circuit cases cited by Petitioners (Petition at 15-16, 20). In *Woodard* v. *Sage Prods., Inc.*, 818 F.2d 841 (Fed. Cir. 1987) (*en banc*), the court did not rule that an appellant's failure to move for preliminary injunctive relief was dispositive of its entitlement to appeal an order which denied it permanent relief. Rather, the court merely observed: "It simply does not hold true that harm *pendente lite* is present whenever a permanent injunction is disposed of on the merits of the claim." 818 F.2d at 852 (citation omitted). *Accord Shirey* v. *Bensalem Township*, 663 F.2d 472, 476 (3d Cir. 1981) ("Thus, one of the factors which the Court has considered significant . . . is whether the party has sought preliminary injunctive relief."); *Plymouth County Nuclear Information Comm., Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 18 (1st Cir. 1981) ("[W]e think plaintiffs are hard pressed to demonstrate that the instant order has any *immediate* consequences of a serious nature, or that they will suffer 'irreparable harm' pending final disposition of the case in the district court.") (emphasis in original). Thus, the First, Third and Federal Circuits have merely opined that, in the cases before them, the appellants' failure to press a motion for preliminary injunctive relief was evidence of a lack of need for interlocutory review.

In analyzing the case before it, the Second Circuit acknowledged the weight other courts had placed on the failure of the appellant to pursue preliminary injunctive relief. It agreed that such conduct should be viewed as a measure of the sufficiency of appellants' showing of "irreparable harm" to be suffered without an immediate appeal. *Volvo* v. *MIPTC*, 839 F.2d at 75 (Petition at A14) (citing *South Bend Consumers Club, Inc.* v.

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why such relief should not be granted. The district court made clear that a motion for preliminary injunctive relief would also be denied if made. While Volvo was contemplating an appeal from the district court's denial of its application, subsequent events made moot its application.

*United Consumers Club, Inc.*, 742 F.2d 392, 394 (7th Cir. 1984); *Shirey* v. *Bensalem Township*, 663 F.2d 472, 476-77 (3d Cir. 1981)).

Where, as here, however, the Complaint alleges a pervasive and continuing course of unlawful action by defendants, and the record reflects that the litigation itself has acted as a preliminary injunction in forestalling the continuation of that conduct, the absence of a motion for preliminary relief in the district court is necessarily less dispositive of the need for an immediate appeal. In a case such as this one, the irreparable harm which would support a preliminary injunction is threatened only after dismissal of the claims, when such relief has been foreclosed. Thus, in reviewing the record before it, the Second Circuit found:

> Plaintiffs-appellants contend that the initiation of this litigation had the effect of deterring MIPTC from pursuing the activities which threatened harm to plaintiffs-appellants, so the necessary showing of imminent harm could not have been made in support of an application for a preliminary injunction. On this record, we cannot conclude that plaintiffs-appellants' failure to seek preliminary injunctive relief below should bar this appeal.

*Volvo* v. *MIPTC*, 839 F.2d at 75 (Petition at A14).

The Second Circuit can hardly be said to be in conflict with the First, Third and Federal Circuits; indeed the Second Circuit agreed with those courts' conclusion that a request for a preliminary injunction should be considered as a factor in reviewing appealability under Section 1292(a)(1). Here, the Second Circuit simply concluded that that factor was not dispositive. Petitioners' claim that the Second Circuit will accept all appeals from denials of injunctive relief which go to the merits, and so will encourage the regular inclusion of a meritless claim for injunctive relief in every complaint, is simply illusory. To the contrary, the Second Circuit specifically warned against the practice of " 'appending perfunctory requests for injunctive relief to complaints as a device to secure immediate appeal of all orders.' " *Volvo* v. *MIPTC*, 839 F.2d at 76-77 n.7 (Petition at

A18, n.7) (quoting *Cable Holdings of Battlefield, Inc.* v. *Cooke*, 764 F.2d 1466, 1472 (11th Cir. 1985)). *See also Chasser* v. *Achille Lauro*, *supra*. Without a showing of serious, perhaps irreparable consequence, as required by *Carson*, the Second Circuit has ruled it has no jurisdiction under Section 1292(a)(1).

Petitioners contend that they seek review in the Court because the Second Circuit misinterpreted the Court's decision in *Carson* as a matter of law (Petition at 2). In the court below, Petitioners conceded that they intended to seek Supreme Court review because they challenged the nature of the disputed factual evidence considered by the Second Circuit. Thus Petitioners stated:

> In other words, appellees are not challenging this [Second Circuit] Court's application of the law to the facts, as appellants contend. Rather, appellees contend that by considering certain kinds of disputed factual evidence, and by ignoring the objective procedural history of this case, the Court made a legal error susceptible of review by the Supreme Court.

Reply Memorandum in Support of Motion to Hold Appeals in Abeyance, dated March 7, 1988, pp. 4-5 (citations omitted).

Petitioners' recognition of the factual basis for the Second Circuit's holding here makes clear that this is not a case which is appropriate for review. The Second Circuit's determination on the factual record, and the specificity of that review of the peculiar facts at issue, make this case one which would require the Court to "review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *see also Southern Power Co.* v. *North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924).

In applying *Carson* to the case at bar, the Second Circuit reviewed Respondents' showing of serious, perhaps irreparable consequence. The court below properly reviewed the record in the district court and found that the continuing unlawful conduct alleged in the complaint had been effectively deterred *pendente lite* by the initiation of the lawsuit. This conclusion was

"fortified" by the Second Circuit's finding that events subsequent to the dismissal of Respondents' lawsuit on the merits established that Petitioners had launched anew their campaign against Respondents, resulting in serious, perhaps irreparable interim harm to Respondents pending disposition of the case in the district court. *Volvo* v. *MIPTC*, 839 F.2d at 76 (Petition at A16).[10] Thus, the Second Circuit permitted Respondents' appeal on the basis of a thorough review of the unique facts before it.

10 Petitioners contend that such a factual review by the Second Circuit was improper, and that Respondents should be constrained to show the serious, perhaps irreparable consequence of delayed appellate review to the district court pursuant to Fed. R. Civ. P. 54(b). If Rule 54(b) were indeed Respondents' only avenue of relief, Section 1292(a)(1) would be supplanted, a result Congress clearly did not intend. If meant to be available only to those appellants seeking review of denials of preliminary injunctions, Section 1292(a)(1) could easily have been drafted to so provide. Rather, Congress made clear that Section 1292(a)(1) confers a *right* to appeal. No discretion lies with the district court as it plainly does pursuant to Section 1292(b). Moreover, that such a factual review was a proper determination for a Court of Appeals in the first instance is assured by the Court's decision in *Carson*. There, the factual determination of serious, perhaps irreparable consequence was made by the Court in the first instance. *Carson*, 450 U.S. 86-90 and n. 16. The Court of Appeals had ruled that the order there was not a denial of an injunction and so had never reached the issue of consequence. *Carson*, 450 U.S. at 82. Petitioners can point to but one opinion for support of their theory (Petition at 17 (citing *Woodard* v. *Sage*, 818 F.2d 841)). However, even in *Woodard*, the Federal Circuit did review the showing of irreparable consequence proffered by appellants in the first instance, and merely found it unpersuasive. *Id.* at 853-55.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: June 2, 1988

Respectfully submitted,

/s/ JAMES J. MALONEY

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## CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Court, hereby certifies that on the 2nd day of June 1988, he caused the annexed Brief in Opposition to Petition for Writ of Certiorari to be served on the following attorneys at the following addresses designated by said attorneys for service of papers by causing three copies of the same to be sent to said attorney in a properly addressed, first-class post-paid envelope. There are no other parties required to be served with the annexed document.

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Dated: New York, New York
June 2, 1988

/s/ JAMES J. MALONEY
James J. Maloney

(4)

No. 87-1823



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL,
M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,
*Petitioners,*

v.

VOLVO NORTH AMERICA CORPORATION,
INTERNATIONAL MERCHANDISING CORPORATION
AND PROSERV, INC.,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether this Court should review a factual determination, based on the record in this particular case, that the facts surrounding the dismissal of respondents' complaint sufficiently demonstrate serious, perhaps irreparable consequences so as to allow an immediate appeal under 28 U.S.C. § 1292(a)(1) and *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981).

## RULE 28.1 STATEMENT

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent International Merchandising Corporation:

International Management, Inc.
IMG Developments Limited
Cleveland Eventos Esportivas, Ltda.
Pier House Press Limited
Europea (Life & Pensions) Limited
Classical Productions (UK) Limited
Adam IMG Limited

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent ProServ, Inc.:

ProServ Television, Inc.
ProServ Europe, S.A.

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IN THE

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OCTOBER TERM, 1987

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No. 87-1823

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MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,
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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## BRIEF IN OPPOSITION

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## REASONS FOR DENYING THE WRIT

The Court of Appeals in this case made a factual determination that, as a result of the dismissal of their antitrust complaint, respondents would suffer serious, perhaps irreparable, consequences such that the District Court's order could be effectively challenged only by an immediate appeal pursuant to 28 U.S.C. § 1292(a)(1).

Petitioners ask this Court to review that factual determination.

Respondents respectfully submit that this Court should not grant a writ of certiorari to review the interlocutory ruling of the Court of Appeals because: (1) even assuming that there is a conflict among the circuits regarding the proper interpretation of *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the Second Circuit's decision was based upon specific factual findings which would support an immediate appeal under any interpretation of *Carson*; and (2) contrary to petitioners' assertions, the Second Circuit's application of *Carson* to the facts of this case is not in conflict with the rule applied in other circuits.

## I. THE SECOND CIRCUIT'S DECISION WAS A FACTUAL DETERMINATION WHICH WOULD SUPPORT AN APPEAL EVEN IF A DIFFERENT INTERPRETATION OF *CARSON* HAD BEEN APPLIED.

Petitioners recognize that, under this Court's decision in *Carson*, an appeal lies under 28 U.S.C. § 1292(a)(1) from an order having the "practical effect" of denying an injunction if the order has a "serious, perhaps irreparable, consequence" and can be " 'effectually challenged' only by immediate appeal." 450 U.S. at 84. This rule is followed in every case cited by petitioners.[1] Petitioners

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[1] *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1142-43 (1988); *Woodard v. Sage Products, Inc.*, 818 F.2d 841, 850 (Fed. Cir. 1987) (*en banc*); *Sims Varner & Assoc., Inc. v. Blanchard*, 794 F.2d 1123, 1126 (6th Cir. 1986); *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1237-38 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Shanks v. City of Dallas*, 752 F.2d 1092, 1096 (5th Cir. 1985); *South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 393-94 (7th Cir. 1984); *Center for Nat'l Sec. Studies v. CIA*, 711 F.2d 409, 413 (D.C. Cir. 1983); *Commodity Futures Trading Comm'n v. Preferred Capital Inv. Co.*, 664 F.2d 1316, 1319 (5th Cir. 1982); *Gould v. Control Laser Corp.*,

further concede that the order of the District Court, which dismissed with prejudice all of the claims of respondents ProServ, Inc. and International Merchandising Corporation, had the "practical effect" of denying them the injunctive relief they sought. Petitioners contend, however, that the Court of Appeals found respondents' appeal proper based upon a holding, which they contend conflicts with the rule in other circuits, that dismissal of a complaint seeking injunctive relief always permits an immediate appeal. Petition at 2.

Petitioners fail to recognize, however, that in addition to discussing the general effect of dismissal of a complaint in the abstract, the Court of Appeals made the precise finding contemplated by *Carson* based upon "consideration of the affidavits" submitted by respondents in opposition to the motion to dismiss the appeal:

> In view of the pervasive influence of MIPTC over men's professional tennis tournaments, [respondents] argue convincingly that if review of their dismissed antitrust claims is deferred until the conclusion of the potentially protracted litigation pending below, these restrictions [imposed by petitioners upon respondents' business] are likely to have a serious and irreparable impact upon their ability to compete with MIPTC in the conduct of men's professional tennis tournaments, and that the order dismissing their antitrust claims can therefore be effectually challenged only by an immediate appeal. Not only, therefore, are the general standards articulated in *General Electric* [*Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932)] and reiterated in *Carson* met here; *there is also a persuasive showing of specific and irreparable harm* which will result from a failure to

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650 F.2d 617, 621 (5th Cir. 1981); *Plymouth County Nuclear Information Comm., Inc. v. Boston Edison Co.*, 655 F.2d 15, 17 (1st Cir. 1981); *Roberts v. St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981); *Shirey v. Bensalem Township*, 663 F.2d 472, 475 (3d Cir. 1981).

exercise appellate jurisdiction at this juncture, which is likely to render ineffectual any relief that might result from an appeal from a final judgment in the litigation pending below.

*Volvo North America Corp. v. Men's International Professional Tennis Council*, 839 F.2d 69, 76 (2d Cir. 1988) (emphasis supplied).[2]

Contrary to petitioners' assertion, therefore, this is not a precedent-setting case of general applicability. Rather, applying *Carson* and *General Electric*, and considering the evidence before it of the particular circumstances in this case, the Court of Appeals properly made the factual determination that respondents had established the sort of "serious, perhaps, irreparable consequence" that will permit an immediate appeal.[3] Whether or not the

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[2] Petitioners err in suggesting that the Court of Appeals' holding that respondents had made a sufficient showing of irreparable injury was dicta. Petition at 14 n.8. "It does not make a reason given for a conclusion in a case *obiter dictum*, that it is only one of two reasons for the same conclusion." *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928). *See also Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924).

[3] Citing *Woodard v. Sage Products, Inc.*, 818 F.2d 841 (Fed. Cir. 1987) (*en banc*), petitioners complain that the Second Circuit's consideration of affidavits submitted by respondents on the issue of irreparable harm was improper. Petition at 14 n.8. While *Woodard* notes the "advisability of at least first proceeding with a motion under Fed. R. Civ. P. 54(b)" to establish a record of irreparable harm, *Woodard*, 818 F.2d 854, respondents were precluded from creating a factual record in that manner, and petitioners' assertions that respondents sought a Rule 54(b) certification "without attempting to develop any factual record of harm," Petition at 23 n.10, is incorrect. In fact, the record before the Court of Appeals showed that respondents' counsel had telephoned the District Judge's chambers to schedule a time to be heard on a Rule 54(b) motion. A law clerk responded that the District Judge would not grant Rule 54(b) certification, even though the motion had not been formally presented or argued. Under these circumstances, it would obviously

circuit courts disagree upon the precise weight to be accorded the fact that the order appealed from dismissed a complaint on the merits, the result in this case would be the same in *any* circuit, and this case is therefore inappropriate for review by this Court.

This Court, of course, rarely reviews factual findings of lower courts. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). For example, in *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923), this Court was asked to overrule a decision of the Second Circuit refusing to stay its mandate pending certiorari. This Court declined to do so, noting that "[i]t is clear that the Circuit Court of Appeals gave full consideration to a similar motion and with a much fuller knowledge than we can have, denied it. As we have said, we require very cogent reasons before we will disregard the deliberate action of that court in such a manner." 262 U.S. at 164. Since the usual practice of this Court is to "accord great weight to a finding of fact" made by a lower court, there is no need for this Court to grant a writ of certiorari to review the factual determination in this case. *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *see also Rogers v. Lodge*, 458 U.S. 613 (1982).

In any event, petitioners do not set forth any basis for this Court to overturn the Court of Appeals' factual finding of irreparable harm. Petitioners suggest only that the respondents' decision not to seek preliminary injunctive relief precludes a finding of irreparable harm.

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have been futile to file a formal motion in the District Court. Declaration of Robert S. Litt, filed October 15, 1987, reprinted in the appendix to this brief at A-1.

In any event, petitioners do not seek review of the question of whether the Court of Appeals considered appropriate evidence, which is surely not worthy of this Court's attention.

Yet none of the cases cited by petitioners supports such a proposition; they merely indicate that the failure to seek preliminary injunctive relief is one factor to be considered in determining whether irreparable harm exists. *Shirey v. Bensalem Township*, 663 F.2d 472, 476 (3d Cir. 1981) ("Thus, one of the factors which the Court has considered significant . . . is whether the party has sought preliminary injunctive relief"); *see also Woodard v. Sage Products, Inc.*, 818 F.2d 841, 852 (Fed. Cir. 1987); *Plymouth County Nuclear Information Comm., Inc. v. Boston Edison Co.*, 655 F.2d 15, 18 (1st Cir. 1981). The Second Circuit, in accord with every other circuit, explicitly considered the fact that respondents had not requested preliminary injunctive relief, but, based on the record before it, decided "we cannot conclude that [respondents'] failure to seek preliminary injunctive relief below should bar this appeal." 839 F.2d at 75. Again, this fact specific conclusion presents no issue of general importance worthy of review by this Court.[4]

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[4] Moreover, the opinion which petitioners seek to have reviewed is an interlocutory one; while the merits of the appeal have been fully briefed and argued, no final decision has yet been made by the Court of Appeals. It is well settled that this Court "should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent *extraordinary inconvenience and embarrassment* in the conduct of the cause." *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893) (emphasis supplied). Indeed, if the decree sought to be reviewed is not a final one, "that of itself alone furnish[es] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Brotherhood of Locomotive Firemen v. Bangor & A. R.R.*, 389 U.S. 327, 328 (1967); Sup. Ct. R. 18 (writ of certiorari to review case pending in court of appeals before judgment granted only upon a showing of such imperative public importance as to justify deviation from normal practice and to require immediate settlement in the Supreme Court). Petitioners cannot make a showing of "extraordinary" circumstances in this case which would warrant immediate Supreme Court review of this interlocutory decision.

## II. THE SECOND CIRCUIT'S DECISION APPLYING *CARSON* CONFORMS WITH THE DECISIONS OF OTHER CIRCUITS.

Petitioners assert that this case and a case from the District of Columbia Circuit, *Center for National Security Studies v. CIA*, 711 F.2d 409 (D.C. Cir. 1983) are "in conflict with the decisions of three other circuit courts . . . ." Petition at 8. Specifically, petitioners assert that the court below held "that the mere fact that a dismissed complaint requested *permanent* injunctive relief, *by itself*, presents a 'serious, perhaps irreparable, consequence' that can only be 'effectually challenged' by immediate appeal" and therefore its decision is "in direct conflict with other circuit courts of appeals . . . ." Petition at 2. Neither of these assertions is supported by the opinion of the Court of Appeals, whose approach was consistent with the approach taken by other Courts of Appeals.

On the one hand, the Second Circuit announced no such inflexible rule of automatic appealability. Following this Court's decision in *General Electric*, it merely noted that in this particular case, the dismissal of the complaint entirely precluded respondents' claims for injunctive relief in a major antitrust case that might last several more years before final judgment. Its conclusion that these circumstances presented irreparable injury sufficient to support an immediate appeal was "fortified" by the specific factual showing made by respondents and discussed above. Similarly, the District of Columbia Circuit, in *Center for National Security Studies v. CIA*, 711 F.2d 409 (D.C. Cir. 1983), held only that on the facts presented, no irreparable injury had been shown. Thus, these cases in no way deviate from this Court's decision in *Carson*.[5]

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[5] Petitioners' concern that as a result of the Second Circuit's decision, "the caseload of the appellate courts may increase dra-

On the other hand, the First, Third and Federal Circuits, which petitioners claim are in conflict with the decision below, are entirely consistent with it. The Third Circuit, for example, has specifically noted that an appeal can be taken under 28 U.S.C. § 1292(a)(1) when an order dismissing part of a case "prevents the plaintiff from obtaining the full injunctive relief requested, or effectively denies relief altogether. . . ." *Presinzano v. Hoffman-LaRoche, Inc.*, 726 F.2d 105, 109 (3d Cir. 1984).[6] The First Circuit, in the very case cited by petitioners, noted that "[i]nterlocutory orders striking claims for injunctive relief entered early in the course of litigation, will often satisfy [the *Carson*] test, since the foreclosure of relief *pendente lite* may have an immediate, and potentially serious, impact of the sort justifying immediate appeal." *Plymouth County Nuclear Information Comm., Inc. v. Boston Edison Co.*, 655 F.2d 15, 17 (1st Cir. 1981). And the Federal Circuit, in *Woodard v. Sage Products, Inc.*, 818 F.2d 841 (Fed. Cir. 1987)

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matically," Petition at 9, is unfounded. In the half century between *General Electric* and *Carson*, appeals were permitted in the Second Circuit under § 1292(a)(1) whenever the trial court dismissed, on the merits, a claim for injunctive relief. *See Williams v. Wallace Silversmiths, Inc.*, 566 F.2d 364, 366-67 (2d Cir. 1977). Yet respondents have found only five reported opinions in the Second Circuit in which appeals were properly taken on such basis. *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 618 F.2d 950 (2d Cir. 1980); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 461 F.2d 1040 (2d Cir. 1972); *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 284 (2d Cir. 1971); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971); *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822 (2d Cir. 1963), *cert. denied*, 376 U.S. 944 (1964). Certainly this does not suggest that the decision below will produce a flood of additional appeals.

[6] In view of the Third Circuit's decision in *Presinzano*, its prior decision in *Shirey v. Bensalem Township*, 663 F.2d 472 (3d Cir. 1981), upon which petitioners rely, was obviously limited to the particular facts in that case.

(*en banc*), based its denial of appellate jurisdiction on the appellants' failure to show irreparable injury in the particular case, noting that "[i]t simply does not hold true that harm *pendente lite* is present *whenever* a permanent injunction is disposed of on the merits of the claim." 818 F.2d at 852 (emphasis supplied).

There is thus no conflict among the circuits. Every court that has considered the issue has recognized that the foreclosure of injunctive relief by the dismissal of a complaint on the merits can be a factor showing irreparable injury so as to permit an immediate appeal pursuant to 28 U.S.C. § 1292(a)(1). The Second Circuit in this case considered that factor, as well as the specific facts of this case, and concluded that the respondents, as this Court held in *General Electric* and specifically reaffirmed in *Carson*, 450 U.S. at 90, had shown "serious, perhaps irreparable" injury sufficient to permit an appeal. That fact-specific conclusion, individual to this case, is unworthy of review by this Court.

## CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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## APPENDIX

## DECLARATION OF ROBERT S. LITT

DISTRICT OF COLUMBIA) ss.:

ROBERT S. LITT deposes and says:

1. I am an attorney of record for appellant ProServ, Inc. I make this declaration in connection with the opposition to appellees' motion to dismiss the above-captioned appeal, to set forth more fully the circumstances surrounding the District Court's refusal to enter final judgment pursuant to Fed. R. Civ. P. 54(b).

2. On September 29, 1987, a conference was held before Staff Counsel in connection with this appeal. Thereafter, I called Judge Duffy's chambers. I told the law clerk that plaintiffs (appellants herein) wanted to make a motion requesting that the court enter final judgment pursuant to Fed. R. Civ. P. 54(b) and that if the Judge was available, all parties were present in the courthouse at that time. I was told that the Judge was on the bench, and asked to call back later.

3. I called back approximately one hour later. I was told that the court was not going to enter final judgment pursuant to Rule 54(b). No papers were filed and no argument was heard in connection with this request.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 14, 1987.

/s/ ____________________

ROBERT S. LITT

No. 87-1823

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,

*Petitioners,*

v.

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION AND PROSERV, INC.,

*Respondents.*

## REPLY BRIEF OF PETITIONERS

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IN THE

# Supreme Court of the United States

**October Term, 1987**

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MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III and PHILIPPE CHATRIER,

*Petitioners,*

v.

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION and PROSERV, INC.,

*Respondents.*

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## REPLY BRIEF OF PETITIONERS

Petitioners respectfully submit this reply brief in response to the briefs of respondents in opposition and in further support of their petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, dated February 8, 1988, which denied petitioners' motion to dismiss respondents' appeals on jurisdictional grounds. *Volvo North America Corp.* v. *Men's International Professional Tennis Council*, 839 F.2d 69 (2d Cir. 1988). In that decision, the Second Circuit effectively held that interlocutory appellate jurisdiction is available to review every non-final order dismissing a claim which incidentally requests permanent injunctive relief, regardless of whether special harm is shown. The Second Circuit's holding conflicts with decisions of other circuit courts properly interpreting *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981), to permit appellate jurisdiction under 28 U.S.C. § 1292(a)(1) over non-final orders that have the practical effect of granting or denying injunctions *only* if

they also have "serious, perhaps irreparable, consequence" and "can be effectually challenged only by immediate appeal." *See also Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, — U.S. —, 108 S. Ct. 1133, 1143 (1988); *Stringfellow* v. *Concerned Neighbors in Action*, — U.S. —, 107 S. Ct. 1177, 1184 (1987).

## ARGUMENT

The central contention of respondents' briefs is that the Second Circuit applied the *Carson* test and merely made a factual determination of serious, irreparable harm. However, it is clear from the Second Circuit's decision that it found the *Carson* requirement of a special showing of serious, irreparable harm entirely dispensable to its exercise of appellate jurisdiction. In misplaced reliance on *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932), the Second Circuit held that interlocutory review is available whenever an order of the district court has "entirely disposed of [a] prayer for injunctive relief." *Volvo*, 839 F.2d at 75. To the extent that the Second Circuit addressed any allegations of harm peculiar to the present case, it did so purely as an afterthought, to "fortify" an independent holding on the law that squarely conflicts with the decisions of the Federal, First and Third Circuits. *Id.* at 76; *see Woodard* v. *Sage Products, Inc.*, 818 F.2d 841, 852-53 (Fed. Cir. 1987) (en banc) (pointing out "the fallacy in accepting as a truism that orders deemed to deny permanent injunctions, as a class, inherently have serious *pendente lite* effect"); *Shirey* v. *Bensalem Township*, 663 F.2d 472, 477 (3d Cir. 1981) ("Congress did not contemplate that § 1292(a)(1) would be utilized as a generally available route to interlocutory appeals merely because the complaint happens to request injunctive

relief"); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 19 (1st Cir. 1981) (the denial of permanent injunctive relief "may be 'effectually challenged' on appeal from final judgment").

Contrary to respondents' contentions, petitioners have never "conceded" or "recognized" that their petition simply seeks review of an appellate court's factual determination. Indeed, the brief of respondent Volvo North America Corporation ("Volvo") quotes petitioners as having argued before the Second Circuit that this petition does *not* challenge any factual determination. Brief of Volvo at 16. The Second Circuit could not have rested its assertion of appellate jurisdiction on a factual determination because respondents failed to develop a record of harm in the district court.[1]

Respondents also contend that even if the Second Circuit misinterpreted or failed to apply the *Carson* requirement of serious, irreparable harm in the present case, it corrected itself in a later decision. *See Chasser* v. *Achille Lauro Lines*, Nos. 87-9081, 87-9083, 87-9085, 87-9087, 87-9089, 87-9091, slip op. (2d Cir. April 7, 1988). That decision, however, simply declined to permit appellate jurisdiction under the collateral order doctrine and in *dicta* noted that appellate jurisdiction would not lie under section 1292 (a)(1) because the denial of a motion to dismiss on forum-

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[1] Nevertheless, insight into the Second Circuit's expansive view of its powers of review can be gained from its *dicta* discussing respondents' supplementation of the record on appeal with affidavits on harm. In that *dicta*, the Second Circuit apparently resolved disputed factual issues by these affidavits which incorporated new material never presented to the district court, disregarding the district court's refusal to find that "there was no just reason for delay" pursuant to Fed. R. Civ. P. 54(b). *See Volvo,* 839 F.2d at 76. The Second Circuit's exercise in fact finding, not the outcome of that exercise, by itself constitutes a legal error susceptible of review by the Supreme Court.

selection grounds was not the equivalent of the denial of an injunction. Nowhere has the Second Circuit renounced its erroneous interpretation of *Carson* permitting interlocutory review whenever a claim seeking ultimate injunctive relief is dismissed.

Ironically, respondents argue that the interlocutory nature of the instant petition requires its denial, based on the congressional policy against piecemeal review. This policy, however, did not dissuade respondents from pursuing their own interlocutory appeals now pending in the Second Circuit. According to respondents, Supreme Court review of the Second Circuit's erroneous assertion of jurisdiction should be delayed because it would render moot any decision by the Second Circuit on the merits of respondents' appeals. It is for precisely this reason that the petition for a writ of certiorari is timely: the sooner the Second Circuit is informed that it does not have the power to hear respondents' appeals, the less time and effort will have been wasted.

## CONCLUSION

Despite respondents' efforts to minimize the import of the Second Circuit's decision, it will have far-reaching impact on the availability of interlocutory review and the pleading tactics of litigants within the Second Circuit. Contrary to the congressional preference for finality, and in conflict with those circuits which have properly interpreted *Carson* v. *American Brands, Inc.*, the Second Circuit rule permits every litigant, merely by inserting into its pleading a request for permanent injunctive relief, to ensure that, if dismissed, its claims will obtain interlocutory review. Petitioners submit that such a radical expansion of appellate jurisdiction should be passed upon by this Court.

Dated: New York, New York
June 10, 1988

Respectfully submitted,

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